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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

*v.*

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REX E. LEE
*Solicitor General*

CAROL E. DINKINS
*Assistant Attorney General*

LOUIS F. CLAIBORNE
*Deputy Solicitor General*

JOSHUA I. SCHWARTZ
*Assistant to the Solicitor General*

JAMES M. SPEARS
RICHARD J. LAZARUS
JACQUES B. GELIN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

LEONARD BICKWIT, JR.
*General Counsel*

MARTIN G. MALSCH
*Deputy General Counsel*

PETER G. CRANE
*Acting Assistant General Counsel*

*Nuclear Regulatory Commission*
*Washington, D.C. 20555*

## QUESTION PRESENTED

Whether the National Environmental Policy Act requires the Nuclear Regulatory Commission to consider stress (and accompanying physical symptoms), allegedly induced in persons residing in the vicinity of the Three Mile Island nuclear power facility by the pending proposal to authorize restart of Unit 1 of that facility (the unit not involved in the 1979 accident), in connection with its action upon that proposal, notwithstanding the absence of any causal nexus between the alleged stress and the effects of the proposed action upon the natural environment.

## PARTIES TO THE PROCEEDING

In addition to People Against Nuclear Energy (the petitioner in the court of appeals), respondents include Metropolitan Edison Co., Jersey Central Power & Light Co., and Pennsylvania Electric Co. (intervenor-respondents in the court of appeals). The latter have previously filed a petition for a writ of certiorari, No. 81-2399 (filed July 1, 1982), seeking review of the judgment of the court of appeals in this case.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the United States Nuclear Regulatory Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (81-2399 Pet. App. 1a-76a)[1] is reported at 678 F.2d 222. The orders of the Nuclear Regulatory Commission reviewed by the court of appeals (Pet. App. 77a-78a, 101a-102a) and ancillary opinions (Pet. App. 79a-100a) are reported at 12 N.R.C. 607 and 14 N.R.C. 593.

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[1] Because the petition for a writ of certiorari filed by *Metropolitan Edison Co.*, No. 81-2399, reproduces all of the materials required by Rule 21(k), and because the Court has granted respondent leave to respond to this petition together with No. 81-2399, we refer to the petitioners' appendix in No. 81-2399, rather than duplicating the materials found there. Hereinafter, "Pet. App." signifies that appendix.

## JURISDICTION

The amended judgment of the court of appeals (Pet. App. 103a-104a) was entered (without supporting opinions) on April 2, 1982.[2] A modified version of the amended judgment (Pet. App. 29a-30a) was entered on May 14, 1982, at the time opinions were entered. On June 23, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 20, 1982. On August 12, 1982, the Chief Justice further extended the time for filing such a petition to and including August 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

Sections 2, 101 and 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, 4331 and 4332, are reported at Pet. App. 109a-113a.

## STATEMENT

1. This case involves the Three Mile Island Unit 1 nuclear power reactor ("TMI-1"), located near Harrisburg, Pennsylvania. After preparing draft and final environmental statements and conducting an extensive safety review, the Atomic Energy Commission in 1974 granted the Metropolitan Edison Company a license to operate TMI-1, and the unit entered service. Four years later, Metropolitan Edison received a license from the Nuclear Regulatory Commission to operate a second unit at the site ("TMI-2"). On March 28, 1979, a significant accident affecting the reactor occurred at TMI-2. At the time of the accident, TMI-1 was not in operation, having been shut down by the licensee for routine maintenance and refueling. In the aftermath of the accident, the Commission directed the licensee to keep TMI-1 shut down

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[2] The April 2 judgment replaced an interim judgment (Pet. App. 105a-107a) issued by the court of appeals, also without opinions, on January 7, 1982.

pending further order of the Commission and announced that it would conduct a hearing to determine whether, and under what circumstances, the licensee should be allowed to resume operation of the plant (Pet. App. 3a-4a). 44 Fed. Reg. 40461 (1979).

By further order, the Commission specified the issues to be addressed by the Atomic Safety and Licensing Board designated to conduct the "restart" proceeding. All related to concerns which the accident at TMI-2 had raised about the safety of TMI-1. *In re Metropolitan Edison Co.*, 10 N.R.C. 141 (1979). They included deficiencies in the design common to the two reactors, the potential for interaction between the plants, the possible effect on TMI-1 of the decontamination of TMI-2, the management capability of the licensee, and deficiencies in the licensee's operating procedures and emergency plans. The Commission added that although accident-related psychological distress on the part of members of the public living near TMI that was "unrelated directly to exposure to radiation" was the subject of "real and substantial concern," it had not yet determined whether such issues "c[ould] legally be relevant to th[e] proceeding." *Id.* at 148. The Commission accordingly invited parties wishing to raise such contentions to address the pertinent legal issues in briefs to the Atomic Safety and Licensing Board, which was directed to certify the issue to the Commission for decision, with or without its own recommendation.

Respondent, People Against Nuclear Energy ("PANE"), an organization composed of TMI neighbors that had intervened in the restart proceeding, responded to the Commission's invitation, submitting two draft contentions for consideration, and arguments that their consideration was legally mandated by the Atomic Energy Act of 1954, 42 U.S.C. (& Supp. IV) 2011 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* ("NEPA"). PANE alleged, first, that the resumed operation of TMI-1 would exacerbate the "severe psychological stress" which its members and other residents of the TMI area had suffered as a result of the accident at

TMI-2. PANE stated that the prevailing stress took the form of "increased anxiety, tension and fear, [and] a sense of helplessness," accompanied by physical symptoms such as skin rashes, aggravated ulcers, and skeletal and muscular problems. PANE alleged that continuing injury to the health of TMI neighbors would result "[a]s long as th[e] possibility [that TMI Unit 1 will reopen] exists" and that it was accordingly "impossible * * * to operate TMI 1 without endangering the public health and safety" (Pet. App. 115a). For its second contention, PANE asserted that resumption of operations at TMI-1 would cause communities in the vicinity of TMI to be perceived as undesirable, thereby exacerbating damage to their economic and social "stability, cohesiveness and well being" caused by "a loss of citizen confidence in the ability of [community] institutions to function properly and in a helpful manner during a crisis" resulting from the aftermath of the 1979 TMI-2 accident. PANE urged that for this additional reason, TMI-1 should never again be allowed to operate (*id.* at 116a).

2. On February 22, 1980, the Licensing Board issued its "Certification to the Commission on Psychological Distress Issues." *In re Metropolitan Edison Co.*, 11 N.R.C. 297 (1980). The Board concluded that the alleged "psychological stress is probably not cognizable under the Atomic Energy Act * * * because such effects are not radiation hazards. *Id.* at 299.[3] On the other hand, the Board concluded that the "Commission, within its discretion, may and should consider psychological stress and community fears for the purpose of mitigating the effects

[3] The Board added that "the Commission might conclude to the contrary for reasons not discussed by the parties." 11 N.R.C. at 299. The Board apparently meant to suggest that the Commission itself had discretion to conclude that PANE's allegations of a mental health effect rested in part upon "radiological hazards associated with accident conditions" and were accordingly cognizable under the Atomic Energy Act. The Board thought that either position adopted by the Commission on this question of interpretation of its governing statute would be entitled to substantial deference and would withstand judicial review. *Id.* at 299-300.

of its TMI 1 licensing activity." 11 N.R.C. at 297, 309.[4] Rejecting the Commission staff's contention that stress and community fears are not cognizable under NEPA because unquantifiable, the Board found "a sufficient prehearing basis for the premise that the effects are measurable," stressing that "[p]recise numerical quantification is not necessary" (*id.* at 302).[5] Acknowledging that

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[4] The Licensing Board rejected the Commission staff's contention that psychological effects of restart authorization are not cognizable under NEPA because not traceable to a "direct impact upon the physical environment." 11 N.R.C. at 300-301. Accepting the staff's premise that such a nexus was required, the Board reasoned, however, that (*id.* at 301):

> [t]he psychological stress alleged by the intervenors here is related to a significant physical environmental impact: the operation of TMI 1 coupled with residual effects of the accident at TMI 2. * * * The very fact that an [environmental impact statement] and cost/benefit balancing [were undertaken at the time TMI was initially licensed] is a recognition of the fact that the operation of TMI 1 involves a significant physical impact upon the environment.

[5] The Board distinguished cases in which the courts of appeals have held psychological and socioeconomic effects of agency action to lie outside the scope of NEPA analysis. See, *e.g.*, *Hanly* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) (*"Hanly II"*) *Maryland-National Capital Park and Planning Commission* v. *Postal Service*, 487 F.2d 1029, 1037-1038 (D.C. Cir. 1973); *First National Bank of Chicago* v. *Richardson*, 484 F.2d 1369, 1375 (7th Cir. 1973); *Nucleus of Chicago Homeowners Association* v. *Lynn*, 524 F.2d 225 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976); see also *Como-Falcon Coalition, Inc.* v. *Department of Labor*, 465 F. Supp. 850, 857 n.2 (D. Minn. 1978), aff'd, 609 F.2d 342 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980). The Board stressed that none of these decisions *precludes* agency consideration of mental health or socioeconomic effects associated with federal action. The Board noted, as well, that many of the foregoing cases involved "the argument that the mere presence of a disadvantaged group of people could constitute a pollution to the enviro[n]ment of a higher socio-economic group," an argument with unacceptable overtones of racial and class discrimination, which, as a matter of policy, was to be excluded from environmental analysis. By contrast here, the Board thought "there [were] no overriding national policies preventing the frank acknowledgement that the pres-

there was no evidence before it that methods existed that "would permit the measurement of the psychological stress phenomenon well enough for use in a full-scale cost/benefit balancing in an [environmental impact statement]," and suggesting that it was within the Commission's discretion to determine whether or not its staff should be directed to develop the necessary methodology, the Board nonetheless concluded that NEPA permitted consideration of the alleged stress in some fashion, even though preparation of a formal environmental impact statement (EIS) or even a threshold environmental impact appraisal (EIA) addressing this subject might not be required or even possible. 11 N.R.C. at 299, 304-305, 306-307.

The Licensing Board also rejected the contention, advanced by the licensee and the Commission staff, that the alleged stress is not cognizable under NEPA in the setting of this case because the fears that are alleged to occasion it are not rationally grounded. 11 N.R.C. at 303-304. The Board observed that the TMI-2 accident underscored the fundamental premise of the Atomic Energy Act, that nuclear power improperly controlled is a source of danger, and "urge[d] the Commission to reject out-of-hand" this contention, suggesting that "fears of TMI 1 operation" are cognizable under NEPA because "they are * * * amenable to mitigation." *Id.* at 304. The Board acknowledged that "the best way to minimize any psychological stress in the communities around TMI 1 is to make the plant safe or not allow it to operate." *Id.* at 308. The Board nonetheless suggested that even if the licensee had totally satisfied the requirements of the Atomic Energy Act, for instance respecting monitoring of radiation released from the plant, consideration under NEPA of stress effects might prompt the Commission to require the licensee to install additional monitoring devices to reduce public apprehension. *Ibid.* The Board further reasoned that giving TMI neighbors the opportunity to

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ence of the impacting force (operation of TMI 1) * * * may be considered * * *." 11 N.R.C. at 303.

voice their fears in the restart proceeding would in and of itself constitute a significant stress mitigation strategy. *Ibid.*

3. On December 5, 1980, the Commission issued an order (Pet. App. 77a-78a) directing that contentions based on "psychological stress" be excluded from the restart proceedings. The order reflected that the four Commissioners then in office were evenly divided as to whether the stress issue should be considered by the licensing board, and that the procedural effect of the tie vote was to exclude the stress issue from the proceedings. The order indicated further that the issue would be reconsidered when the vacant fifth seat on the Commission had been filled.

No opinion for the Commission was issued. Instead each Commissioner wrote separately explaining his vote. Chairman Ahearne concluded that "an NRC licensing action is not an appropriate forum for psychological stress issues" (Pet. App. 79a). He maintained that stress is not cognizable under the Atomic Energy Act, and described "the issue of whether NEPA provides sufficient authority to impose mitigation measures on the licensee in the context of the restart proceeding" as "problematical" (*id.* at 80a). He accordingly concluded that the Commission's only obligation respecting stress was to mitigate any such effects by ensuring that TMI-1 is safe before restart is authorized.

Emphasizing that "the psychological stress at issue is not that associated with actual exposure to radiation—but the stress caused by the possibility that [respondent's members] and others might be so exposed by future operation," and that "[t]here is no way to allay that fear except not to build or operate the reactor" (Pet. App. 82a), Commissioner Hendrie agreed that neither the Atomic Energy Act nor NEPA required consideration of respondents' contentions respecting stress, as such, and that the Commission's obligation was, instead, to ensure that TMI-1 is operated safely, and that the public is adequately informed of the relevant facts (*id.* at 82a-

91a). Commissioner Hendrie concluded that Congress did not intend that the Commission consider stress in licensing decisions under the Atomic Energy Act (*id.* at 83a-87a). Respecting NEPA, Commissioner Hendrie relied upon the weight of federal appellate authority placing psychological effects outside the scope of the required environmental analysis. He rejected PANE's suggestion that the physical manifestations of the alleged stress served to distinguish this case, explaining (Pet. App. 89a):

> Presumably, psychological distress will always be accompanied by physical symptoms in a certain proportion of the persons affected. As a legal matter, I see no basis for differentiating between psychological stress that has physical symptoms and that which is without physical manifestations * * *. In either case, the problems of quantification and proof would be such as to make rational factfinding extremely difficult * * *.

Commissioner Hendrie argued that the nature of the alleged effects of the restart decision upon mental health rendered considerations of mitigation mandated by NEPA irrelevant (*ibid.*):

> If anxieties are rationally based, the corrective measures which would alleviate the stress would presumably be justifiable in terms of protecting physical health and safety [under NEPA or the Atomic Energy Act]—irrespective of their effect on psychological stress. If the anxieties are irrationally based, on the other hand, then they are by definition not likely to be alleviated by a demonstration that some additional safety feature has been added.

Finally, Commissioner Hendrie underscored that stress occasioned by fear of operation of TMI-1 was unrelated to any environmental impact of operation and was accordingly entirely outside the intended scope of NEPA (*id.* at 90a-91a; emphasis in original):

> NEPA is a very broad statute and has had, as it was intended to have, a profound effect upon agency decision making. But unless it is to displace the po-

litical process it must have some limits. It cannot be read to require that all conceivably relevant factors be heard by an agency including those already considered by Congress. It was intended and must be so construed to deal with *environmental* degradation. To be sure if one of a project's effects on the environment causes health problems, the associated mental impacts are in [*sic*] an appropriate consideration, but here we are being asked to consider effects apart from any effect upon the environment.

Intervenors' argument is essentially that even if we are satisfied that the environmental impact is minimal, we must nevertheless hear evidence on, and consider in our decision, their fears that we are wrong and the mental stress thus engendered. The short answer is that Congress has already decided that the country is to have a nuclear power program even if it makes some people uneasy.

Commissioners Gilinsky and Bradford would have directed the Licensing Board to hear evidence respecting stress effects, Commissioner Gilinsky (Pet. App. 91a-92a) relying primarily upon the Licensing Board's analysis. Commissioner Bradford argued (*id.* at 93a-100a) that the TMI-2 accident made the TMI-1 restart hearing a unique one and that, under the circumstances, an important means of alleviating stress that might be occasioned by the Commission's decision would be to allow full airing of the stress issue before the Licensing Board.

4. On February 3, 1981, pursuant to 28 U.S.C. (Supp. IV) 2342(4) and 42 U.S.C. 2239(b), PANE filed a petition for review of the Commission's order excluding the issues it sought to raise from the restart hearing.[6] On ap-

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[6] On September 17, 1981, after the vacancy on the Commission had been filled, the Commission, by a majority vote, reaffirmed its directive that the stress issue was excluded from the restart proceeding (Pet. App. 7a, 101a-102a). No opinion for the Commission was issued.

During the restart proceedings several parties argued that preparation of an EIS was required before any decision respecting re-

peal, PANE argued that both NEPA and the Atomic Energy Act required the Commission to consider the psychological stress contentions in the restart proceeding. Specifically, PANE asserted that whether the "major federal action" in question was considered to be the restart of TMI-1 itself, or its original licensing coupled with continued NRC regulation, psychological stress and community deterioration were impacts requiring evaluation in an environmental impact statement or supplemental statement (Pet. App. 10a). PANE further asserted that the Commission's responsibility under the Atomic Energy Act to protect "public health and safety" encompassed psychological health.

The Commission argued, however, that the projected restart of TMI-1 did not require further environmental analysis under NEPA because an EIS had been prepared when operation of the TMI-1 plant first was authorized and because the restart decision itself did not represent a proposal for federal action within the meaning of NEPA, since it would restore the status quo as it existed before the Commission required the plant to remain shut down pending investigation of the accident at TMI-1 and its implications. Even if there were a proposal for federal action, the Commission argued, stress occasioned by operation of a nuclear power plant was not the type of effect which required evaluation in an environmental impact statement. Similarly, the Commission contended

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start could be made. The Commission staff disagreed, but, pursuant to Commission regulations, prepared an environmental impact assessment to support that determination. The EIA was issued on March 27, 1981, and supplemented on May 11, 1981, but in accordance with the Commission's directive to the Licensing Board, neither document addressed the alleged stress effects of the restart proposal. On December 15, 1981, while this case was under submission to the court of appeals, the Licensing Board rendered a decision that the EIA was adequate and that no EIS was required. Because the decision of the court of appeals requires further agency action, and because the TMI-1 plant is not yet physically ready for restart for reasons unrelated to this case, the Commission itself has yet to take final action respecting NEPA compliance (Pet. App. 7a n.3).

that its duty under Section 103(d) of the Atomic Energy Act, 42 U.S.C. 2133(d), to deny any license the issuance of which "would be inimical to * * * the health and safety of the public" comprehended the physical hazards associated with nuclear materials but not the psychological effects arising from fears of nuclear technology. The TMI licensee, which had intervened in the court of appeals took essentially the same position.

A panel of the court of appeals, Circuit Judges Wright and Wilkey and Senior Circuit Judge McGowan, heard oral argument on November 17, 1981. On January 7, 1982, the court issued an interim judgment unaccompanied by an opinion for the court, from which Judge Wilkey dissented (Pet. App. 105a-107a). The judgment vacated the Commission's order and directed the Commission to prepare an environmental assessment regarding the effect of the proposed restart of TMI-1 on the "psychological health of neighboring residents and on the well-being of the surrounding communities" (*id.* at 106a). The Commission was further ordered to determine, on the basis of this environmental assessment, whether to prepare a full environmental impact statement. The Commission was enjoined from making any decision to restart TMI-1 until it had complied with these requirements. In addition, the Commission was directed to submit a statement of its reasons for believing psychological health not to be cognizable under the Atomic Energy Act.[7]

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[7] On March 30, 1982, the Commission issued a "Memorandum and Order" responding to the court's directive (Pet. App. 8a). Relying on the text and legislative history of the Atomic Energy Act, as well as pertinent judicial decisions, the Commission asserted that Congress intended that, in administering the Atomic Energy Act, it address itself only to the physical hazards associated with nuclear materials and activities. The Commission added that even if its statutory authority under the Act were broad enough to permit the discretionary consideration of mental health effects, strong policy considerations counseled against doing so. The Memorandum and Order was adopted by a 3-1 vote, with Commissioner Gilinsky dissenting and one seat on the Commission vacant.

On April 2, 1982, the court of appeals issued an amended judgment (Pet. App. 103a-104a), promising opinions to follow, again over Judge Wilkey's dissent. The amended judgment differed from the prior judgment in several respects. First, the Commission was no longer required to prepare an environmental assessment, but was instead directed to determine, by whatever procedures it deemed appropriate, whether, since the preparation of the original environmental impact statement on TMI-1, "significant new circumstances or information have arisen with respect to the potential psychological health effects of operating the TMI-1 facility" (*id.* at 104a). If the Commission answered that question in the affirmative, it was to prepare a supplemental environmental impact statement addressing both psychological health effects on individuals and effects on the well-being of the surrounding communities of operating TMI-1. Second, the court of appeals vacated the previously issued injunction against restart, explaining that because of "operating difficulties" at TMI-1 of which it took notice (discovery of a corrosion problem in the plant's steam generators that necessitates major repairs before restart), the injunction against restart was unnecessary. The court directed the Commission, however, to give 30 days' notice if it intended to permit renewed operation "prior to complying with its obligations under NEPA" (*ibid.*). The amended judgment made no reference to the Atomic Energy Act.

On May 14, 1982, the court of appeals issued its opinions (Pet. App. 1a-76a).[8] Judge Wright, joined by Judge McGowan, with Judge Wilkey dissenting, held that NEPA requires consideration in the restart proceeding of petitioner's contentions respecting psychological stress. At the same time, a different majority, Judge Wilkey, joined by Judge McGowan, with Judge Wright dissenting, upheld as reasonable the Commission's interpretation of its duties under the Atomic Energy Act, excluding from considera-

[8] A modified version of the amended judgment (Pet. App. 29a-30a) resting upon the opinions for the court was also issued.

tion in licensing actions "stress allegedly resulting from fear of a nuclear accident" (*id.* at 67a).

On the NEPA issue, Judge Wright declared that "[b]oth [of PANE's] contentions allege environmental effects within the meaning of NEPA" (Pet. App. 10a). He deemed it inconceivable that all mental health effects, no matter how severe, of any proposed federal action, whatever its nature, are outside the scope of NEPA (*id.* at 11a, 17a). Accordingly, he reasoned that mental health effects of proposed federal actions are cognizable under NEPA because effects on health have generally been regarded as within the scope of NEPA, and because of "the simple fact that effects on psychological health are effects on the health of human beings" (*id.* at 11a-12a). The court distinguished cases holding that the social fears and anxieties of persons residing near proposed federal projects are not environmental effects cognizable under NEPA see page 5 note 5, *supra*), observing that "[n]one of these cases * * * presents the holocaust potential of an errant nuclear reactor" (Pet. App. 15a).[9] Disavowing establishment of any general rule, the court acknowledged that "NEPA does not encompass mere dissatisfactions arising from social opinions, economic concerns, or political disagreements with agency policies" (*id.* at 16a), but held that NEPA does apply to mental health effects of federal actions, if sufficiently grave, such as the "post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe" (*id.* at 16a-17a). Without attempting to identify a benchmark for other cases, the court simply stated (*ibid.*):

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[9] Distinguishing earlier court of appeals decisions excluding from NEPA analysis claims that federal projects would induce influxes of "undesirable" persons into the impacted neighborhood, the court proclaimed (Pet. App. 16a):

> In this case, in contrast, PANE is not asking the agency to evaluate the effect of "people pollution" on the environment, but rather the effect of a governmental decision on human health.

> We cannot believe that the psychological aftermath of the March 29 [TMI-2] accident falls outside the broad scope of the National Environmental Policy Act [10]

The court also rejected the Commission's alternative argument that the restart proceeding involved no proposal for federal action subject to NEPA (Pet. App. 18a-23a). Disavowing any reliance upon "the happenstance that TMI-1 was shut down for refueling at the time of the accident," however, the court instead stated that "the extent of the Commission's statutory responsibilities over licensed nuclear power facilities creates a continuing obligation to comply with NEPA" and that "[t]he 'major federal action' in the case of TMI-1 is not solely the initial licensing decision, but the Commission's continued exercise of supervisory responsibility over its operation and maintenance" (*id.* at 18a-19a). Treating NRC's regulation of its license as a continuing proposal for major federal action significantly affecting the environment, the court invoked the criteria for supplementation of an EIS prescribed by the Council on Environmental Quality NEPA regulations, directing that the agency prepare a supplemental EIS covering stress as well as the socioeconomic issues raised by PANE (see pages 3-4, *supra*), if it determined that "significant new circumstances or information" regarding the mental health effects of operating TMI-1 had arisen since completion of the EIS prepared at the time of initial licensing (Pet. App. 23a-26a).

Judge Wilkey dissented from the court's NEPA holding (Pet. App. 31a-59a, 67a-69a). He stated his view that

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[10] Respecting PANE's allegation of socioeconomic effects, the court of appeals accepted the Commission's concession that this presents a "classical 'socioeconomic' issue" constituting a secondary indirect effect which, under the regulations of the Council of Environmental Quality and pertinent precedents, does not in and of itself require preparation or supplementation of an EIS, but which must be addressed if other matters require such formal NEPA analysis (Pet. App. 17a-18a).

the majority had effected an unprecedented expansion of the scope of NEPA by requiring consideration of stress resulting from fears of a federal action—*i.e.*, an effect that is not traceable to the actual environmental impact of the activity to be licensed by the federal action (*id.* at 36a-38a; footnotes omitted; emphasis in original):

> Judge Wright's opinion cites several cases holding that agencies must prepare an EIS when there is a potential effect on human health. What the opinion does not acknowledge is that in each of these cases the effect on health was caused by the federal action itself, *not* by individual's *fears* of the federal action. * * *
>
> [O]peration of a nuclear power plant may cause harm to human health—for example, due to the potential for exposure to radiation—and the NRC must therefore prepare an EIS and consider these potential harms before licensing the plant. * * *
>
> PANE's contention, however, is not that operation of TMI-1 will affect human health because of the dangers inherent in operation of a nuclear facility, but that individuals' *fears* of an accident at the plant, combined with their lack of confidence in the NRC, will lead to an extension of the psychological stress allegedly caused by the TMI-2 accident. It is patently obvious that this alleged effect is *entirely different* from those health effects at issue in any NEPA case relied upon by the majority. Instead of being required to assess *the risk* of a proposed activity * * * the agency is now required to assess *how people perceive and react to the risk.* PANE's primary purpose is to force the agency to determine whether people so fear renewed operation of TMI-1 that it should not go forward, even if the agency's assessment of the actual risk indicates that the impact on health will not be significant.
>
> This takes NEPA far beyond its intended purpose. *The environmental effects of a federal activity are now to include the views of the population itself on the very desirability of the activity* * * *.

Judge Wilkey noted that the majority's holding was contrary to decisions of other courts of appeals, as well as a prior decision of the District of Columbia Circuit (Pet. App. 39a-40a & nn. 19-21). He argued, as well, that the mental health effects alleged by PANE are too ephemeral, speculative and subjective to be measured for purposes of environmental analysis (*id.* at 40a-42a). Finally, Judge Wilkey found insupportable the majority's efforts to confine its ruling to the facts of this case, explaining that the severity of an effect relates only to the nature and extent of the analysis required by NEPA and not to the threshold question whether the effect is an environmental impact within the scope of NEPA (*id.* 42a-48a).[11]

## REASONS FOR GRANTING THE PETITION

This case presents a fundamental question under the National Environmental Policy Act (NEPA). In requiring that the Nuclear Regulatory Commission consider

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[11] Judge Wilkey also rejected the majority's view that the initial licensing and ensuing oversight regulation of the TMI-1 facility constituted for NEPA purposes a single continuing major federal action (Pet. App. 48a-50a). He noted that under the majority's analysis "the fact that * * * the NRC is proposing to restart the plant is irrelevant." That analysis, Judge Wilkey explained, is inconsistent with the requirements of NEPA, which governs only proposed actions. Judge Wilkey appears to have concluded that because TMI-1 was shut down, the Commission's restart decision constituted federal action for NEPA purposes (*id.* at 50a). He stressed, however, that the majority's analysis was exceedingly broad and would effect a substantial and unwarranted increase in the NEPA obligations of NRC and all other federal agencies. For instance (*id.* at 49a):

> [U]nder the majority's interpretation, the NRC is engaged in * * * "action" [subject to NEPA] every second of every day. It thus will be possible for NEPA to apply even when a nuclear plant is operating pursuant to an NRC license and the NRC proposes to take no action to upset this status quo.

stress associated with renewed operation of the TMI-1 facility, the court of appeals lost sight of the terms of Section 102(2)(C) of NEPA which establishes the obligation to prepare a "detailed statement" to accompany "every recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment." Rather than directing a survey of *all effects* of such an action, the statutory requirement is to canvass *"the environmental impact of the proposed action"* (42 U.S.C. 4332(2)(C)(i)). The court of appeals' analysis, discarding this limitation, and extending the NEPA obligation to encompass all effects upon the welfare of mankind that plausibly may be assigned the label "health," imposes a substantial burden upon all federal agencies and does not advance the objectives of the National Environmental Policy Act. The decision of the court of appeals is, in this respect, contrary to numerous decisions of the other courts of appeals. Because of the onerous consequences the ruling below will have for all federal decision-making, the judgment of the court of appeals should be reviewed by this Court.[12]

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[12] If free to do so, we would also present for review the question whether NEPA imposes upon the Nuclear Regulatory Commission a continuing obligation to reassess the environmental impacts of a licensing decision in light of changed circumstances or information even in the absence of any proposal for further federal action. The majority opinion below (Pet. App. 18a-26a) appears to give an affirmative answer that is irreconcilable with this Court's decisions in *Weinberger* v. *Catholic Action of Hawaii*, No. 80-1377 (Dec. 1, 1981), slip op. 6-7; *Kleppe* v. *Sierra Club*, 427 U.S. 390, 398-406 (1976); and *Aberdeen & R. R.R.* v. *SCRAP*, 422 U.S. 289, 320, 322 (1975). We do not tender that issue for review only because the result in this case probably does not turn upon its resolution. As Judge Wilkey observed (see page 16 note 11, *supra*), the application of NEPA in this case could rest upon the far narrower ground that the NRC is here engaged in federal action—the restart proceeding. Indeed, whether required to do so or not, the Commission staff actually prepared an environmental impact appraisal here, determining on that basis that no EIS was required (see page 9 note 6, *supra*). In this setting the question whether

1. As in other contexts, questions of statutory interpretation under the National Environmental Policy Act must begin with the pertinent statutory language. *Andrus* v. *Sierra Club*, 442 U.S. 347, 356 (1979). The duty of federal agencies to file environmental impact statements arises from Section 102 of NEPA, 42 U.S.C. 4332, which provides, in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action * * *.[18]

As the statutory language plainly reflects, the duty imposed is not to assess all effects of proposals for federal

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such NEPA compliance was actually required by law lacks the general importance of the issue that we have tendered for review. And because of the availability of the narrower ground suggested by Judge Wilkey, the question whether the court of appeals' continuing obligation analysis (which may be dictum) is sound is not presented in sharp focus here. Should the Court disagree with this assessment, however, and conclude that the issue is properly presented, we should not be understood to have waived that question. Cf. *Piper Aircraft Co.* v. *Reyno*, No. 80-848 (Dec. 8, 1981), slip op. 10 n.12.

[18] The obligation to prepare environmental assessments and to undertake other forms of preliminary environmental analysis less formal than the full environmental impact statement contemplated by Section 102(2)(C) has been interpolated into the Act by the courts, see *e.g.*, *Hanly* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) (*"Hanly II"*), and through the regulations promulgated by the Council on Environmental Quality, see 40 C.F.R. 1501.3, 1501.4(b) and (c), as a means of enforcing the requirement of preparation of environmental impact statements.

action, but only to consider the *environmental* impacts of the agency proposal.

Although the precise issue presented by our petition has never been addressed by this Court—presumably because a negative answer to the generic question presented has been self-evident—the decisions rendered by the Court in this field reflect the exclusively environmental focus of the assessment duties imposed by NEPA. Thus, for instance, the Court has explained that "NEPA * * * create[s] a discrete procedural obligation on Government agencies to give written consideration of environmental issues in connection with certain major federal actions." *Aberdeen & R. R.R.* v. *SCRAP*, 422 U.S. 289, 319 (1975). The EIS has been characterized as a "detailed statement of environmental consequences," *Kleppe* v. *Sierra Club*, 427 U.S. 390, 394 (1976), and the Court has explained that (*Andrus* v. *Sierra Club*, *supra*, 442 U.S. at 350)):

> The thrust of § 102(2)(C) is * * * that environmental concerns be integrated into the very process of agency decision making. The "detailed statement" it requires is the outward sign that environmental values and consequences have been considered * * *.

See also *Weinberger* v. *Catholic Action of Hawaii*, No. 80-1377 (Dec. 1, 1981), slip op. 3. Although "NEPA does create * * * a right of action in adversely affected parties to enforce" its requirements (*Aberdeen & R. R.R.* v. *SCRAP*, *supra*, 422 U.S. at 319), the Court has repeatedly emphasized that the role entrusted to the courts is strictly delimited: "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences * * *." *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980); see also *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978); *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 410 n.21.[14]

[14] The intended focus on environmental effects of proposed federal action is underscored by the Council on Environmental Quality's

As Judge Wilkey and Commissioner Hendrie each recognized (see pages 7-9 and 14-16, *supra;* Pet. App. 36a-38a, 90a-91a), the consideration of stress allegedly induced by the fear of operation of TMI-1 (and, indeed, by the pending proposal itself) effects a fundamental and dramatic expansion of the scope of analysis under NEPA. Significantly, the gravamen of PANE's allegations is not that the Commission has failed adequately to consider some kind of environmental degradation in any form. Nor is it that some impact of TMI-1 operation upon the natural environment—such as radiation—will cause injury to the health (whether mental or physiological) of its members that has been inadequately considered. Compare *Weinberger* v. *Catholic Action of Hawaii, supra,* slip op. 2. Rather, PANE's allegation is that the existence of the plant itself, apart from any environmental impact it might create, will cause emotional injury to TMI-1's neighbors.

As Judge Wilkey observed (Pet. App. 36a), it is not sufficient to reason, as did the majority (*id.* at 11a-12a), that mental health is health for NEPA purposes; for health effects, like any other class of effects of a federal

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NEPA regulations, to which substantial deference is due. See *Andrus* v. *Sierra Club, supra,* 442 U.S. at 357-358. Although the regulations supply no definition of the term "environmental," they provide that the statutory term "human environment" embraces "the natural and physical environment and the relationship of people with that environment." 40 C.F.R. 1508.14. And although the regulations specify that the environmental impacts to be addressed include both direct and indirect effects that are "caused by the action" including "ecological * * * aesthetic, historic, cultural, economic, social, or health" effects (40 C.F.R. 1508.8), the regulations make clear that such effects are not cognizable under NEPA unless traceable to the impact of the federal action upon "the natural and physical environment and the relationship of people" thereto. The regulations accordingly specify that "economic or social effects are not intended by themselves to require preparation of an impact statement" and that when a statement is otherwise required, it shall address economic or social effects only to the extent that they are "interrelated" with "natural or physical environmental effects." 40 C.F.R. 1508.14.

action generally cognizable under NEPA, are cognizable only to the extent that they are proximately traceable to the impact of the federal action on the natural and physical environment. The range of possible causes of psychological stress is almost unlimited. Bringing all of those within NEPA would radically change that law from an environmental statute to one that deals generally with human emotions. Assuming that psychological effects are reached by NEPA, only those that are caused by environmental factors are covered.[15] Absent such a proximate causal nexus, the effect of federal action simply does not qualify as an "environmental impact" required to be analyzed under NEPA.

Thus, while effects of federal action upon human health may occasion NEPA analysis, the statutory requirement is necessarily limited to environmentally-generated health effects—a fundamental limitation upon agency responsibility under NEPA that was entirely disregarded by the court of appeals.[16] The issue for NEPA purposes, was not,

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[15] Because the court of appeals' decision completely disregards this fundamental limitation upon the scope of the analysis required by NEPA, we have not pursued here the question whether the particular mental health effects alleged by PANE are outside the scope of NEPA for the independent reason that the chain of causation between the federal action and the alleged effects may be so lengthy and attenuated, and the effect so speculative, as to render NEPA analysis unnecessary. Clearly, there are situations in which effects of federal action, psychological or otherwise, are outside the scope of the mandated NEPA analysis for this reason. *Cf. Vermont Yankee Nuclear Power Corp.* v. *NRDC, supra*, 435 U.S. at 551. The private petitioners' submission appears to be broader than our own in this respect. See 81-2399 Pet. 17-18.

[16] It has never been suggested, so far as we are aware, that, for instance, the Food and Drug Administration must file EIS's pertaining to drug approval actions. See, *e.g.* 21 C.F.R. 25.1(f). Yet the logic of the court of appeals' decision, that NEPA analysis was required here because NRC proposed to make "a government decision [affecting] human health" (Pet. App. 16a) is surely applicable to those decisions, even though we trust that no one would seriously

as the court of appeals assumed, whether NEPA requires consideration of environmentally-generated mental health effects of federal actions. Rather, the relevant inquiry is whether stress that allegedly arises from the political facts that TMI-1 exists and that the Commission has authority delegated by Congress to license its renewed operation—a cause entirely distinct from the radiation or accident potential associated with plant operation—is cognizable under NEPA.[17] The plain statutory language requires a negative answer.[18]

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suggest the health effects of such decisions are propagated through the natural or physical environment in the sense Congress meant to address.

[17] It was accordingly irrelevant to the question presented for decision that the majority, unsurprisingly perhaps, found it difficult to believe that "[r]egardless of the severity of psychological health effects * * * [they] would [be] exclude[d] from consideration at any stage of the NEPA procedures relating to any proposed federal action" (Pet. App. 11a). Equally misplaced was the majority's reliance (*id.* at 13a) upon language of Section 102(2)(A) of NEPA, 42 U.S.C. 4332(2)(A), requiring use of a "systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts." The court of appeals failed to give any consideration to the purpose that this interdisciplinary approach was to serve, stated in the language that immediately follows the quoted phrase—"in planning and in decisionmaking which may have an impact on man's environment."

[18] The legislative history of NEPA underscores that Congress intended to require consideration only of the effects of environmental impacts of federal action—*i.e.*, of those effects traceable to some measurable or physically discernible influence upon, or alteration of, the physical environment. Senator Jackson, the "father" of NEPA, and the senior manager on the part of the Senate in the Conference Committee that had produced NEPA, explained this nexus and its relevance to human health (115 Cong. Rec. 40416 (1969)):

> What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which

The decision of the court of appeals is in tension with fundamental principles established under NEPA in other respects as well. It is well established that NEPA imposes upon the concerned federal agency the responsibility for determining the environmental impacts of proposed action. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen, supra,* 444 U.S. at 227; *Vermont Yankee Nuclear Power Corp.* v. *NRDC, supra,* 435 U.S. at 558; *Kleppe* v. *Sierra Club, supra,* 427 U.S. at 410 n.21. In doing so, the agency may be required to consider eventualities that are not certain

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endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable damage to the air, land and water which support life on earth.

Both the Senate Report on the bill that supplied the pertinent language of NEPA (S. Rep. No. 91-296, 91st Cong., 1st Sess. 4 (1969)) and Senator Jackson's remarks presenting the Conference Report (115 Cong. Rec. 40417 (1969); emphasis added) contain a revealing listing of perceived environmental quality problems:

> * * * haphazard urban and suburban growth; crowding, congestion and conditions within our central cities which result in civil unrest *and detract from man's social and psychological well-being*; the loss of valuable open spaces; inconsistent and often, incoherent rural and urban land-use policies; critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems; needless deforestation; the decline and extinction of fish and wildlife species; faltering and poorly designed transportation systems; poor architectual design and ugliness in public and private structures; rising levels of noise; the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards * * *.

Significantly, each of the effects listed is rooted in a discernible impact upon the natural or physical environment. As Judge Wilkey observed (Pet. App. 37a n.17), PANE's reliance upon the italicized language is unavailing for it reflects only that the underlying environmental causes of social and psychological malaise should be considered. A fortiori there is no suggestion that social or mental ills that are not environmentally grounded are nonetheless environmental impacts for NEPA purposes.

to arise, although remote and speculative possibilities need not be addressed. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 551. To treat individuals' fears respecting the environmental consequences of agency action (and stress occasioned by those fears) as environmental effects of the federal action in their own right, as the court of appeals has done here, is tantamount to holding, contrary to settled law, that an agency does not discharge its obligations by taking a "hard look" at the environmental consequences of federal action.[19]

2. The decision of the court of appeals is contrary to decisions of every other court of appeals that has considered the issue, as well as a well-reasoned decision of the District of Columbia Circuit itself. The courts of appeals have uniformly recognized that psychological and socioeconomic effects that are not environmentally grounded are outside the scope of the analysis required by NEPA.

For instance, while requiring that a federal agency take cognizance of a broad range of urban environmental effects, including noise associated with construction of a federal detention center in close proximity to a dense residential setting (*Hanly* v. *Mitchell*, 460 F.2d 640, 647 (2d Cir.), cert. denied, 409 U.S. 990 (1972) (*"Hanly I"*)), the United States Court of Appeals for the Second Circuit has made it equally clear that effects lacking an environ-

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[19] The quintessentially non-environmental nature of the stress impacts alleged by PANE is reflected strikingly by considering the nature of measures, if any, that might be attempted to mitigate these effects. Given the fundamental role that mitigation plays in the NEPA process, see 40 C.F.R. 1502.14(f), 1502.16(h), 1503.3(d), 1505.2(c), 1505.3 and 1508.20, it is striking that, as Commissioner Hendrie observed (Pet. App. 82a, 89a; see page 8, *supra*), the alleged stress effects admit of no meaningful mitigation. To be sure, the Licensing Board suggested (11 N.R.C. at 304, 308), that mitigation is possible. Significantly, however, the actual measures identified—provision of an opportunity for airing of fears and installation of additional monitoring devices, assuming they would be effective, are themselves directed to respondents' consciousness, rather than the environmental effects of operation of TMI-1.

mental nexus are outside NEPA (*Hanly* v. *Kleindienst*, 471 F.2d 823, 833 (1972), cert. denied, 412 U.S. 908 (1973) ("*Hanly* II")):

> For the most part [plaintiffs'] opposition is based upon a psychological distaste for having a jail located so close to residential apartments * * *. It is doubtful whether psychological or sociological effects upon neighbors constitute the type of factors that may be considered [under NEPA].

Similarly, in terms that are fully applicable here, Judge Leventhal, writing for a panel of the District of Columbia Circuit, rejected the claim that an influx of low-income workers into a suburban location could constitute an environmental impact within the contemplation of NEPA (*Maryland-National Capital Park and Planning Commission* v. *Postal Service*, 487 F.2d 1029, 1037 (1973)):

> Concerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people pollution on "environment," if the term be stretched to its maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress.[20]

To similar effect is *Breckinridge* v. *Rumsfeld*, 537 F.2d 864, 865-867 (6th Cir. 1976), cert. denied, 429 U.S. 1061 (1977). There the court rejected the claim that unemployment caused by closing of a military base was an environmental impact cognizable under NEPA, explaining that although "NEPA goes beyond * * * the 'physical environment' * * * factors other than the physical environment [are to be considered] * * * only when there exist[s] a primary impact upon the physical environment." Accord: *Image of Greater San Antonio, Texas* v. *Brown*, 570 F.2d

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[20] The court also indicated that some aesthetic effects of federal action, like psychological effects of federal action, are outside the scope of the class environmental effects of federal action cognizable under NEPA. *Maryland-National Capital Park and Planning Commission* v. *Postal Service*, 487 F.2d at 1038 & n.5.

517, 522 (5th Cir. 1978); *Como-Falcon Community Coalition, Inc.* v. *Department of Labor*, 609 F.2d 342, 345-346 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980); *Goodman Group, Inc.* v. *Dishroom*, 679 F.2d 182, 184-186 (9th Cir. 1982).[21] And several courts of appeals have specifically rejected the claim that social fears and anxieties arising from federal action must be addressed under NEPA, in the absence of an environmental effect. See, *e.g.*, *Nucleus of Chicago Homeowners Association* v. *Lynn*, 524 F.2d 225, 231 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976); *First National Bank of Chicago* v. *Richardson*, 484 F.2d 1369, 1380 n.23 (7th Cir. 1973); see also *Como-Falcon Coalition, Inc.* v. *Department of Labor*, 465 F. Supp. 850, 861-862 (D. Minn. 1978), aff'd, 609 F.2d 342, 345-346 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980).

The court of appeals recognized the force of the above-mentioned decisions, but sought to distinguish them by stressing the special "holocaust potential of an errant nuclear reactor" (Pet. App. 15a), and couching its holding in case-specific terms. But, as Judge Wilkey convincingly argued (*id.* at 41a-48a), there is no logical basis for confining the court's holding to the facts of this case; the

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[21] The rule of these cases is consistent with CEQ regulations. See page 19 note 14, *supra*. We underscore, however, that neither those regulations, nor the above cited cases—as we read them—require analysis of non-environmentally-grounded socio-economic effects of federal action. Rather, even if preparation of an EIS is required for independent reasons, there is no requirement that social and economic effects of federal action be canvassed unless they are proximately traceable to natural or physical environmental effects of the action. 40 C.F.R. 1508.14.

The court of appeals' reliance (Pet. App. 13a) on *Chelsea Neighborhood Associations* v. *Postal Service*, 516 F.2d 378, 388 (2d Cir. 1975), is misplaced, because the court below overlooked this limitation. In *Chelsea Neighborhood Association*, the court of appeals merely held that an EIS that had been prepared was inadequate because it failed to address social and psychological effects upon residents of a housing project alleged to arise directly from the unique physical form of the project.

cognizability of a class of effects under NEPA cannot turn upon their alleged severity (or mildness) in a particular case. And the court of appeals' cryptic explanation (*id.* at 16a) that "in contrast [to the foregoing cases], PANE is not asking the agency to evaluate the effect of 'people pollution' on the environment, but rather the effect of a governmental decision on human health," simply ignores the rationale of the conflicting decisions, *i.e.*, that NEPA requires only the analysis of environmental impacts.

3. The decision of the court of appeals threatens to increase substantially the burden of federal agency compliance with NEPA. To be sure, the decision of the court of appeals nominally went no further than to hold NEPA applicable to "post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe" (Pet. App. 16a-17a). But as Judge Wilkey pointed out in his dissent, the majority opinion has clear implications for a host of activities licensed or conducted by the Commission and other federal agencies (*id.* at 41a-48a).

If agencies must take account of stress that is not proximately traceable to an environmental effect of agency action under NEPA, forms of stress other than "post-traumatic stress" may also be cognizable, as may stress that is not accompanied by physical symptoms or that is caused by factors other than "fears of recurring catastrophe." Psychological stress contentions are not unique to TMI-1. Judge Wilkey noted four other NRC proceedings in which psychological stress contentions had been raised (Pet. App. 57a-59a), and others could now be added to that list.[22]

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[22] Responding to the uncertainty created by the court of appeals' holding, the Commission, on July 16, 1982, issued a policy statement providing guidance to its Licensing Boards and staff as to the treatment of stress issues in proceedings other than TMI-1. 47 Fed. Reg. 31762 (1982). The Commission directed Licensing Boards to exclude any contention that did not contain all three elements relied upon by the court of appeals: " 'post-traumatic anxieties,' "

More broadly, virtually every federal activity arguably generates psychological impacts; such impacts simply are not confined, as the court of appeals suggested, to nuclear energy. Examples of such activities include management of air traffic control, operation of National Airport, management of federal prisons, economic programs with their effects on life and livelihood, leasing of federal lands for coal mining, construction of dams, and construction and operation of military facilities. The amorphous nature of psychological effects, moreover, renders their assessment in all of these circumstances especially burdensome and subjective. Finally, as explained above, in discarding the requirement of an environmental nexus that limits NEPA obligations, the court of appeals has effected an extraordi-

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accompanying " 'physical effects,' " and the prior occurrence of a major accident at the site in question, giving rise to " 'fears of recurring catastrophe' " (*ibid.*). The policy statement embodied the Commission's view that, to date, the only accident serious enough to trigger a duty to evaluate psychological stress under NEPA was the TMI accident. The Commission's narrow reading of the court of appeals' decision permits the exclusion of psychological stress contentions from ordinary licensing proceedings, but as long as the court of appeals' decision stands, any Commission ruling excluding psychological stress contentions from a proceeding runs a substantial risk of reversal, for the reasons suggested by Judge Wilkey's dissent. Accordingly, the issuance of the Commission's policy statement does not significantly reduce the precedential importance of the court of appeals' decision. Because the Commission was confronted with stress contentions modeled on PANE's contentions in a host of pending proceedings, and was not free simply to disregard the court of appeals' decision, it was reasonable for the Commission to adopt a uniform rule to be applied pending final action by this Court, rather than simply allowing its licensing boards to interpret the decision of the court of appeals in possibly conflicting fashions. In formulating that interim guidance, it was reasonable for the Commission to accept at face value the qualifications embodied in the court of appeals' ruling, so as to give the narrowest possible effect to the court of appeals' ruling, which is believed to be erroneous. At the same time, the Commission believes, as does the United States, that the logical implications of the court of appeals' analysis are far broader.

nary expansion of the task of assessment established by that statute, potentially encompassing all of the non-environmental effects of federal actions that do affect the environment, as well as the health-related effects of actions not environmental at all.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
*Solicitor General*

CAROL E. DINKINS
*Assistant Attorney General*

LOUIS F. CLAIBORNE
*Deputy Solicitor General*

JOSHUA I. SCHWARTZ
*Assistant to the Solicitor General*

JAMES M. SPEARS
RICHARD J. LAZARUS
JACQUES B. GELIN
*Attorneys*

LEONARD BICKWIT, JR.
*General Counsel*

MARTIN G. MALSCH
*Deputy General Counsel*

PETER G. CRANE
*Acting Assistant General Counsel*

*Nuclear Regulatory Commission*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,
*Petitioners,*

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
*Respondents.*

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**On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

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MARGARET F. EWING
(Counsel of Record)
GEOFFREY P. MILLER
BRUCE J. ENNIS
ENNIS, FRIEDMAN, BERSOFF & EWING
Suite 511
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 775-8100
*Attorneys for* Amicus Curiae
*American Psychological Association*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-358

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UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,
*Petitioners,*

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
*Respondents.*

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**On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

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### INTEREST OF *AMICUS CURIAE*

The American Psychological Association (hereafter "APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The APA has more than 55,000 members and includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.

One of APA's major functions has been to promote psychological research, to improve research methods, and to disseminate information regarding human psychological behavior through meetings, scientific publications and special reports. A substantial and growing number of APA's members, including over 500 of its members who belong to the Division of Population and Environmental

Psychology, are systematically studying the psychological effects of environmental stimuli. The APA wishes to inform the Court about current research, data, and methods available to identify, quantify and predict the psychological effects of environmental factors relevant in this case.

Counsel for the parties have consented to the filing of this *amicus* brief. Their letters of consent have been filed with the Clerk.

## SUMMARY OF ARGUMENT

Both petitions are premature. Both raise legal issues and assert conflicts between circuits that are not likely to be presented when a factual record is developed in this case.

Petitioners in No. 81-2399 (hereafter "Utilities") contend that non-measurable effects are not cognizable under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (hereafter "NEPA"), and that the Court of Appeals therefore erred in ruling, as a matter of law that, in limited circumstances, psychological effects are cognizable under NEPA whether they are measurable or not. Petitioners in No. 82-358 (the United States and the Nuclear Regulatory Commission, hereafter the "Commission") assume that psychological effects can be cognizable under NEPA, but only if there is a "causal nexus" between those psychological effects and the effects on the *physical* environment of the federal action under review. Asserting that there is no such causal nexus on the facts of this case, the Commission contends that the Court of Appeals erred in ruling, as a matter of law, that the psychological effects alleged by respondents are cognizable under NEPA. Both rulings are alleged to conflict with rulings in other circuits.

If psychological effects are, in fact, measurable at Three Mile Island (hereafter "TMI"), and if there is, in fact, a causal nexus between psychological effects and the effects of the federal action on the physical environment, the legal issues raised by the Utilities and by the

Commission would not be presented by this case. The record before the Court contains no evidence on those factual issues, and the Commission has not decided those issues. However, *amicus* contends, and the evidence currently before the Commission in a related proceeding in this case confirms, that psychological effects are, in fact, measurable at TMI, and that there is, in fact, a causal nexus between psychological effects and the effect of the federal action on the physical environment.

In these circumstances, the Court need not, and should not, on this record decide the legal issues raised by the petitioners since development of a factual record may make resolution of these legal issues unnecessary. Similarly, development of the factual record may eliminate the alleged conflict between the holding of the Court of Appeals and decisions in other circuits.

## ARGUMENT

### THE COURT SHOULD NOT DECIDE THE ISSUES RAISED BY THESE PETITIONS ON THE BASIS OF THE PRESENT FACTUAL RECORD.

As *amicus* will show, it is likely that the two legal issues raised by petitioners will not need to be decided, and the asserted conflicts with other circuits will not exist, once the Commission has addressed the critical factual issues underlying those legal issues. This Court should decline to resolve the legal issues until a factual record is developed. *See Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 257 (1948); *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *Board of Education, Island Trees Union Free School District* v. *Pico*, —— US. ——, 50 U.S.L.W. 4831 (June 25, 1982) (White, J., concurring).

The majority of the Court of Appeals panel held that certain types of psychological stress—post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe—are "health" effects that

must be considered under NEPA in connection with the Commission's decision whether to permit the restart of a reactor located at the site of a recent, serious nuclear accident.[1]

The Utilities assert that psychological effects are never cognizable under NEPA because, in their opinion, psychological effects can never be measured.[2] They contend that the decision below conflicts with decisions of other courts of appeals and with the intent of Congress insofar as it holds that NEPA requires consideration of effects even if those effects cannot be measured.

The Commission does not assert that psychological effects are not cognizable under NEPA—indeed, it assumes that such effects *are* cognizable under NEPA. The Commission contends that, for an effect to be cognizable under NEPA, there must be a "causal nexus" between the effect in question and the effects of the proposed action on the natural environment. The Commission asserts that such a nexus is lacking.[3]

The arguments of both the Utilities and the Commission are based on assumptions about the facts in this case. The Utilities assert that psychological effects at Three Mile Island cannot be measured, and thereby perceive a conflict between the decision below and decisions of other courts of appeals which they characterize as holding that nonquantifiable effects are not cognizable under NEPA. Util. Pet. 10-15. The Commission asserts that a causal nexus is lacking between the effects of the proposed federal action at TMI on the natural or physical environment and the psychological stress suffered by resi-

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[1] *People Against Nuclear Energy* v. *United States Nuclear Regulatory Commission*, 678 F.2d 222 (D.C. Cir. 1982).

[2] Petition of Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company 10-15 (hereafter "Util. Pet.").

[3] Petition of Nuclear Regulatory Commission and the United States for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, 17, 27-29 (hereafter "NRC Pet.").

dents of the surrounding area. NRC Pet. 20-22. The Commission therefore concludes that the panel below erroneously interpreted NEPA to apply to psychological effects that are not in the Commission's view caused by an effect of the proposed action on the natural or physical environment.

These factual assertions, however, find no support in the record. Because of the procedures used by the Commission in this case, the agency record reviewed by the Court of Appeals, and which petitioners seek to bring before this Court on writs of certiorari, contains no factual evidence, and no analysis of the factual allegations that are in the record. There is, therefore, no assurance in the administrative record that the legal issues raised by petitioners are necessarily or actually presented for review. Indeed, *amicus* contends that petitioners' factual assertions regarding the measurability and causation of psychological effects are incorrect. Those issues, in any event, are now being considered by the Commission in an ongoing proceeding it initiated to comply with the judgment and order of the Court of Appeals. This Court should deny the present petitions and await completion of that proceeding before addressing the legal questions presented by the Utilities and the Commission.

### A. The Critical Factual Issues Involved in This Case Have Not Yet Been Resolved.

In the wake of the serious accident at the TMI-2 reactor, the Commission directed its Atomic Safety and Licensing Board (hereafter "Licensing Board") to hold a hearing on whether to allow restart of the undamaged TMI-1 reactor.[4] The Commission recognized that the psychological impact of the restart on people living nearby was a matter of "real and substantial concern,"[5] but it did *not* instruct or authorize its Licensing Board either to receive factual evidence on the psychological impact

[4] Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1) CLJ-79-8, 10 NRC 141 (1979).

[5] *Id.*

question or to analyze the factual allegations submitted to the Board on that question. The Commission was unsure whether psychological impact was of any legal relevance to the restart proceedings. Accordingly, the Commission directed its Licensing Board only to receive factual *allegations* and legal briefs directed to the issue and to certify the question to the full Commission for decision.

The Licensing Board received factual allegations from respondents that restarting TMI-1 would cause serious psychological stress to the residents of the surrounding area.[6] The Licensing Board also received briefs from the parties on whether psychological stress was legally relevant to the restart proceedings. It did *not* receive factual evidence on the psychological impact issue or engage in analysis of the factual allegations. Instead, it certified the question whether psychological stress was legally relevant to the full Commission, together with its recommendation that respondents' factual allegations did establish an issue of legal relevance on which the Licensing Board should receive factual evidence.[7]

The Commission effectively overruled the Licensing Board and determined that psychological impact was not legally relevant to the restart proceedings. Thus, neither the Licensing Board nor the full Commission ever received or analyzed factual evidence relating to the issue of psychological harm resulting from the restart of TMI-1.

It is the Commission's refusal to permit evidence to be received in support of respondents' allegations of psychological harm that was reviewed by the Court of Appeals. Thus, like the Commission, the Court of Appeals had no factual record before it on the question of psychological harm. The court confined its holding to the legal proposition that respondents' allegations of post-

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[6] Util. Pet. App. 115a-116a.

[7] Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1) LPB-80-8, 11 NRC 297 (1980).

traumatic stress accompanied by physical effects and caused by fears of recurring catastrophe were cognizable under NEPA. Thus, the record does not contain any factual evidence on the issues of whether psychological stress of TMI residents is measurable, and whether there exists a causal nexus between the effect of the federal action on the physical environment at TMI and the psychological stress which respondents contend those living near the reactor would suffer.

The Commission has reopened its docket, in a phase of this proceeding that is not presently before the Court, for the specific purpose of receiving evidence relevant to the issue of psychological stress in order to determine whether a supplemental environmental impact statement is required under the terms of the Court of Appeals' judgment and order.[8] The Commission, in that proceeding, has attempted to evaluate whether respondents' allegations of significant psychological harm resulting from the TMI-1 restart are supportable—a determination that necessarily requires the Commission to evaluate (1) whether there would actually be a causal nexus between the TMI-1 restart and psychological stress suffered by those living nearby, and (2) whether psychological stress can be measured with sufficient precision to determine whether the stress suffered by people living near the reactor would be significant. The Commission has received a great deal of evidence in this reopened proceeding but has not yet issued a decision.

**B. The Factual Record is Not Sufficiently Developed to Determine Whether the Legal Issue Raised by the Utilities is Necessarily and Actually Presented on the Facts of this Case.**

The Utilities contend that the decision below conflicts with decisions of other courts of appeals, as well as with the congressional intent underlying NEPA, in that it holds that non-measurable effects are cognizable under

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[8] *See* Commission Order CLI-82-13, *In the Matter of Metropolitan Edison Company, et al.*, Docket No. 50-289 (July 16, 1982).

NEPA. Util. Pet. 10-15. The Utilities further contend, with no support in the record, that psychological effects are not measurable, a contention that was also made by Judge Wilkey in his opinion dissenting from the decision below.

Both the Utilities' and Judge Wilkey's arguments are based on the assumption that psychological effects are not measurable. In fact, however, nothing in the record of this case indicates that psychological effects are unquantifiable. The panel majority did not so hold; its decision was based on allegations made by respondents before the Licensing Board that post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe, are measurable. The court also stated that precise quantifiability is not the benchmark for determining when an effect is cognizable under NEPA. 678 F.2d at 229.

Although this Court could conceivably use this case as a vehicle to decide whether non-measurable effects are ever cognizable under NEPA, sound reasons counsel against doing so. As *amicus* will demonstrate below, current scientific research suggests that many psychological stress effects are, indeed, measurable with a considerable degree of reliability. If psychological effects at TMI are measurable, then the legal issue whether NEPA applies to non-measurable effects is not presented in this case, and the alleged conflict between circuits would disappear.

Thus, if the Court were to address the measurability issue now, there is a substantial likelihood that its decision would be shown, on the basis of a more fully developed factual record, to have been unnecessary. Although the Court's decision would not be advisory in an Article III sense, many of the policies underlying the rule against advisory opinions—the need to limit the judicial function to deciding sharply defined issues reflecting real, concrete adversity between the parties—also counsel against deciding the question whether NEPA applies to non-

measurable effects on the basis of the presently available record.

The possibility that psychological stress at TMI is, in fact, measurable is quite substantial. Contrary to the opinion of the dissenting judge below, the assessment of acute psychological effects is neither "ephemeral" nor "speculative." A considerable body of scientific research has established that stress and anxiety predictably result from environmental stimuli which threaten a person's interests or otherwise make strong demands on him.[9] The current scientific consensus is that the severity and duration of acute stress reactions to external environmental stimuli, such as accidents and disasters, can be measured through application of several assessment methodologies.[10]

An individual's psychological state can be measured through application of standardized, reliable and validated assessment instruments. For example, symptoms can be measured by using an instrument such as Symptom Checklist-90, a 90-item multidimensional symptom inventory that assesses the extent to which symptoms such as nausea, headache, nervousness, and loneliness are experienced as bothersome.[11] The inventory yields an

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[9] *See, e.g.*, F. Bates *et al.*, THE SOCIAL AND PSYCHOLOGICAL CONSEQUENCES OF DISASTER (National Academy of Sciences 1963); Hudgens, *Personal Catastrophe and Depression*, STRESSFUL LIFE EVENTS: THEIR NATURE AND EFFECTS (B. Dohrenwend & B. Dohrenwend eds. 1974); Perry, *Detecting Psychopathological Reactions to Disaster*, 7 SOCIAL BEHAVIOR AND PERSONALITY 173 (1979); Perry & Lindell, *The Psychological Consequences of Natural Disasters*, 3 MASS EMERGENCIES 194 (1978).

[10] P. Walker, W. Fraize, J. Gordon & R. Johnson, PROCEEDINGS OF THE WORKSHOP ON PSYCHOLOGICAL STRESS ASSOCIATED WITH THE PROPOSED RESTART OF THREE MILE ISLAND, UNIT 1 (Feb. 1982) (hereafter "Proceedings"); A. Baum *et al.*, CHRONIC AND ACUTE STRESS ASSOCIATED WITH THREE MILE ISLAND ACCIDENT AND DECONTAMINATION, PRELIMINARY FINDINGS OF A LONGITUDINAL STUDY (Draft report submitted to USNRC, 1981).

[11] The SCL-90 and the Minnesota Multiphasic Personality Inventory are objective instruments in widespread use for the assessment

index of global symptom distress (the total number of symptoms experienced as being bothersome) as well as a number of subscales reflecting emotional disturbances and physical or psychological problems. Factor analysis and multivariant regression techniques identify related groups of symptoms which may then be categorized under the traditional categories of depression, anxiety, anger, distress, etc.[12]

Existing states of anxiety can also be measured by comparing the task performance of a stressed subject with population norms.[13] Some psychological states are also evidenced by measurable physiological changes. For example, people who are maintained in a constant state of stress discharge abnormally high amounts of catecholamine in their urine.[14]

It is also possible to examine both the long term chronic stress reactions to natural and technological disasters and anticipatory anxieties in individual cases concerning such events.[15] Although these phenomena have been less fully

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of psychopathology. They are easily administered and yield reliable and valid information about psychological functioning. They have been used effectively in large scale research studies as well as in the assessment of dysfunction in individuals. Derogatis, Rickels & Rock, *The SCL-90 and the MMPI: A Step in the Validation of a New Self-Report Scale*, 128 BRITISH J. OF PSYCHIATRY 280 (1976); Derogatis, Lipman & Covi, *SCL-90: An Outpatient Psychiatric Rating Scale—Preliminary Report*, 9 PSYCHOPHARMACOLOGICAL BULLETIN 13 (1973); W. Dahlstrom & G. Welsh, AN MMPI HANDBOOK: A GUIDE TO USE IN CLINICAL PRACTICE AND RESEARCH (1960).

[12] *See generally* N. Nie, C. Hull, J. Steinbrenner & D. Bent, STATISTICAL PACKAGE FOR THE SOCIAL SCIENCES (1975).

[13] *See, e.g.*, A Baum, R. Fleming & J. Singer, COPING WITH VICTIMIZATION BY TECHNOLOGICAL DISASTER (1982).

[14] *See* A. Baum *et al.*, CHRONIC AND ACUTE STRESS ASSOCIATED WITH THREE MILE ISLAND ACCIDENT AND DECONTAMINATION, PRELIMINARY FINDINGS OF A LONGITUDINAL STUDY (Draft report submitted to USNRC, 1981).

[15] C. Frederick, VIOLENCE AND DISASTER: IMMEDIATE AND LONG TERM CONSEQUENCES (1981).

researched than acute reactions, studies indicate that, especially among certain high risk groups, chronic disabling reactions occur and are aggravated by actual or threatened stressful events.[16] Individuals suffering such reactions have been demonstrated to be more subject to physical ailments and disease than their non-stressed counterparts.[17]

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[16] Bromet & Dunn, *Mental Health of Mothers Nine Months After the Three Mile Island Accident*, 14 URBAN AND SOCIAL CHANGE REVIEW 12 (1981); Kasl, Chisholm & Eskenazi, *The Impact of the Accident at the Three Mile Island on the Behavior and Well-being of Nuclear Workers: Part I. Perceptions and Evaluations, Behavioral Responses, and Work-Related Attitudes and Feelings*, 71 AM. J. OF PUBLIC HEALTH 472 (1981); Kasl, Chisholm & Eskenazi, *The Impact of the Accident at the Three Mile Island on the Behavior and Well-being of Nuclear Workers: Part II. Job Tension, Psychophysiological Symptoms, and Indices of Distress*, 71 AM. J. OF PUBLIC HEALTH 484 (1981).

[17] On the basis of research and clinical findings obtained during more than 50 years of work, it can be stated categorically that psychological stress and physical illness are inextricably interwoven. Psychological problems such as depression, anxiety and personality disorders often first present themselves with physical symptom patterns associated with hypertension, hypoglycemia, dermatological conditions, diabetic neuropathy and a range of other conditions. Similarly, some physical illnesses are first diagnosed as psychological disorders. There is strong evidence that the presence of psychological stress can exacerbate a variety of physical illnesses including cancer, neurological conditions such as multiple sclerosis, and pulmonary disorders such as asthma and emphyzema. Thus, decision makers must consider the effect of increasing environmental stresses, like those involved in human-created or natural disasters, on the large number of people with pre-existing physical conditions. *See generally* Melick, *Life Changes and Illness: Illness Behavior of Males in the Recovery Period of a Natural Disaster*, J. OF HEALTH AND SOCIAL BEHAVIOR 335 (1978); Melick, *Social, Psychological and Medical Aspects of Stress Related Illnesses in the Recovery Period of a Natural Disaster*, DISSERTATION ABSTRACTS INTERNATIONAL 1239 (1976); Rahe, *The Pathway Between Subjects Recent Life Changes and Their Near-Future Illness Reports: Representative Results and Methodologies Issues*, STRESSFUL LIFE

Just as psychological stress can be measured in individuals, its incidence in various populations can be identified, quantified and predicted. With the aid of sophisticated computer programs and statistical methods, psychological epidemiologists are now able to determine, with acceptable reliability, the extent of psychopathology in general and special populations. Using random sampling techniques, validated questionnaire instruments administered by trained personnel, and carefully selected control groups, it is possible to collect data concerning the salient psychological characteristics and functional levels of large groups of people.[18] As in the case of individual psychological evaluations, researchers agree that the most valid data can be obtained through application of several methodologies including psychological and biological assessment and task performance.

Many of the studies of psychological stress at TMI have already been placed in the record of the Commission's ongoing proceeding concerning the psychological stress effects of restarting TMI-1. The Commission and its staff, therefore, have before them a substantial amount of factual material that was not in the record before the Court of Appeals. Thus, the Commission will have an opportunity to determine, in the first instance, whether psychological health effects are sufficiently measurable at TMI so that an assessment is possible whether those effects are significant. Accordingly, this Court should deny the present petitions while awaiting the results of the Commission's ongoing proceeding.

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EVENTS: THEIR NATURE AND EFFECTS (B. Dohrenwend & B. Dohrenwend eds. 1974); Richlin, Shale & Rahe, *Five Year Medical Follow-up of Navy POWs Repatriated from Vietnam: Preliminary Results*, U.S. NAVY MEDICINE 19 (1980).

[18] B. Dohrenwend & B. Dohrenwend, SOCIAL STATUS & PSYCHOLOGICAL DISORDER, A CAUSAL INQUIRY (1969); Seisser, *Epidemiology of Life Stress*, 11 PSYCHOLOGICAL MEDICINE 1 (1981).

### C. The Factual Record is Not Sufficiently Developed to Determine Whether the Legal Issue Raised by the Commission is Necessarily or Actually Presented on the Facts of this Case.

The Commission, unlike the Utilities, does not assert that psychological effects are not cognizable under NEPA —indeed, it assumes such effects *are* cognizable under NEPA. NRC Pet. 20-21. Instead, the Commission argues that the court below erred in interpreting NEPA as requiring federal agencies to take into account effects which, even if cognizable under NEPA, are not, in the Commission's view, causally connected to the effect on the natural environment stemming from the proposed federal action. The Commission's view appears to be that, for a psychological effect to be cognizable under NEPA, there must be (1) a major federal action (2) that has a direct effect on the natural environment (3) which, in turn, is linked by a "causal nexus" with (4) the psychological effect. The Commission argues that the "causal nexus" factor was lacking in the present case.

As an initial matter, *amicus* agrees with respondents that the Commission's interpretation of NEPA is strained insofar as it requires the federal action to directly affect the "natural" or physical environment (as opposed to the human environment). NEPA was passed for the benefit of human beings; it is concerned with the "human environment", not with the natural environment considered in isolation from any human reactions.

However, one need not disagree with the Commission's interpretation of NEPA in order to conclude that the Court should deny the petition in the present case. Assuming, for purposes of argument, that the Commission's interpretation is correct, it can plausibly be argued that each of the four elements which the Commission seems to believe NEPA requires are present on the facts of this case. First, the decision to permit restart of the TMI-1 reactor is a major federal action, and the Commission does not argue otherwise. *See* NRC Pet. 17-18 n.12. Sec-

ond, restarting the TMI-1 reactor will have an effect on the physical (non-human) environment, through the dramatic alteration of conditions of temperature and pressure within the reactor and through other physical effects of reactor operation. The Commission's own regulations require preparation of an environmental impact statement in connection with the decision whether to grant an operating license to a nuclear plant. *See* 10 C.F.R. § 51.21 (1982). Because an environmental impact statement is also required in connection with the construction license, *see* 10 C.F.R. § 51.20 (1982), the environmental impact statement at the operating license stage is primarily or wholly concerned with the physical effects of starting up a nuclear reactor. Similar physical effects occur during the restart of a reactor, such as TMI-1, that has been temporarily shut down. Third, there is, at least according to respondents' allegations before the Licensing Board, a causal nexus between the effect on the natural environment and human psychological health. And, finally, the effect on psychological health is a health effect the Commission itself assumes is cognizable under NEPA.

On this analysis, the only dispute between the Commission and respondents is whether there exists a causal nexus between the effect on the physical environment and the psychological stress experienced by those living near the reactor. That issue, however, is not a dispute of law but one of fact, and is not the type of issue that is ordinarily reviewed by this Court on writ of certiorari. Granting the petition on this fact issue would be particularly undesirable since the administrative record contains no finding whether restarting TMI-1 would, in fact, cause the type of psychological stress alleged by respondents. That issue is pending before the Commission now in its reopened proceedings, and evidence on the causality question has been presented to the Commission in those proceedings.

Considable research has already been done to determine the kind and amount of psychological stress experienced

by persons living near TMI.[19] In addition, efforts have been made to predict, on the basis of such studies and on

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[19] A Baum *et al.*, CHRONIC AND ACUTE STRESS ASSOCIATED WITH THREE MILE ISLAND ACCIDENT AND DECONTAMINATION, PRELIMINARY FINDINGS OF A LONGITUDINAL STUDY (Draft report submitted to USNRC 1981); A. Baum *et al.*, PSYCHOLOGICAL STRESS FOR ALTERNATIVES OF DECONTAMINATION OF THREE MILE ISLAND-2 REACTOR BUILDING ATMOSPHERE (USNRC Report 1980); Bromet & Dunn, *Mental Health of Mothers Nine Months After the Three Mile Island Accident*, 14 URBAN AND SOCIAL CHANGE REVIEW 12 (1981); E. Bromet *et al.*, PRELIMINARY REPORT ON THE MENTAL HEALTH OF THE THREE MILE ISLAND RESIDENTS (1980); Bromet, Schulberg & Dunn, *Reactions of Psychiatric Patients to the Three Mile Island Nuclear Accident*, ARCHIVES OF GENERAL PSYCHIATRY (in press); E. Bromet *et al.*, THREE MILE ISLAND: MENTAL HEALTH FINDINGS (NIMH Contract #278-79-0048(SM) 1980); Chisholm & Kasl, *The Effects of Work Site, Supervisory Status, and Job Function on Nuclear Workers' Responses to the TMI Accident*, JOURNAL OF OCCUPATIONAL BEHAVIOR (in press); Chisholm *et al.*, *Behavioral and Mental Health Effects of the TMI Accident on Nuclear Workers: A Preliminary Report*, 365 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 134 (1981); B. Dohrenwend *et al.*, REPORT OF THE TASK GROUP ON BEHAVIORAL EFFECTS, STAFF REPORTS TO THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THE THREE MILE ISLAND (U.S.G.P.O. 257-308 1979); C. Flynn, THREE MILE ISLAND TELEPHONE SURVEY, PRELIMINARY REPORT ON PROCEDURES AND FINDINGS (USNRC 1979); M. Goldhaber, P. Houts, & R. DiSabella, MOBILITY OF THE POPULATION WITHIN 5 MILES OF THREE MILE ISLAND DURING THE PERIOD FROM AUGUST 1979 THROUGH JULY 1980 (Report to TMI Advisory Panel on Health Research Studies of the Pa. Dept. of Health 1981); Governor's Office of Policy Planning, THE SOCIO-ECONOMIC IMPACTS OF THE THREE MILE ISLAND ACCIDENT: FINAL REPORT (1980); Houts & Goldhaber, *Psychological and Social Effects on the Population Surrounding TMI After the Nuclear Accident on March 28, 1979*, in ENERGY, ENVIRONMENT AND THE ECONOMY (S. Majumdar ed. 1981); P. Houts *et al.*, HEALTH-RELATED BEHAVIORAL IMPACT OF THE THREE MILE ISLAND NUCLEAR INCIDENT PARTS I AND II (Report to TMI Advisory Panel on Health Research Studies of the Pa. Dept. of Health 1980); P. Houts *et al.*, HEALTH RELATED BEHAVIORAL IMPACT OF THE THREE MILE ISLAND NUCLEAR INCIDENT PART III (Report to TMI Advisory Panel on Health Research Studies of the Pa. Dept. of Health 1981); Houts, DiSabella & Goldhaber, *Extent and Duration of Psychological Distress of Persons in the Vicinity of Three Mile Island*, 54 PROCEEDINGS OF THE PENNSYLVANIA

extrapolation from data on the psychological aftermath of other disasters, what additional stress would be caused by restarting TMI-1 on the site of the previous nuclear accident.[20]

Studies have also been undertaken concerning the psychological stress caused the high risk groups—mothers of young children,[21] plant workers[22] and psychiatric

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ACADEMY OF SCIENCES 22 (1980); T. Hu *et al.*, HEALTH-RELATED ECONOMIC COSTS OF THE THREE MILE ISLAND ACCIDENT (Report submitted to TMI Advisory Panel on Health Research Studies of the Pa. Dept. of Health 1981); Kasl, Chisholm & Eskenazi, *The Impact of the Accident at the Three Mile Island on the Behavior and Well-Being of Nuclear Workers: Part I. Perceptions and Evaluations, Behavioral Responses and Work-Related Attitudes and Feelings*, 71 AM. J. OF PUBLIC HEALTH 472 (1981); Kasl, Chisholm & Eskenazi, *The Impact of the Accident at the Three Mile Island on the Behavior and Well-Being of Nuclear Workers: Part II. Job Tension, Psychophysiological Symptoms, and Indices of Distress*, 71 AM. J. OF PUBLIC HEALTH 484 (1981); D. Mileti, D. Hartsough & P. Madsen, THE THREE MILE ISLAND INCIDENT: A STUDY OF BEHAVIORAL INDICATORS OF HUMAN STRESS (Report to Shaw, Pittman & Trowbridge, Legal Counsel to General Public Utilities and Metropolitan Edison, final report forthcoming); J. Morell & G. Spivak, REVIEW OF STUDIES ON THE PSYCHOLOGICAL AND BEHAVIORAL IMPACT OF THE TMI NUCLEAR ACCIDENT, WITH SPECIFIC IMPLICATIONS FOR RESEARCH AND PLANNING (Dept. of Mental Health Sciences, Hahnemann Medical College, unpublished 1980); D. Shearer, THREE MILE ISLAND NUCLEAR ACCIDENT COMMUNITY IMPACT STUDY ON REAL ESTATE (Greater Harrisburg Board of Realtors 1980).

[20] *See, e.g.*, Proceedings 39-46; R. Holt, A SELECTIVE REVIEW OF RESEARCH ON HEALTH EFFECTS OF THE ACCIDENT AT THREE MILE ISLAND (NIMH Contract #5-K06-MH-12455 1982).

[21] Bromet & Dunn, *Mental Health of Mothers Nine Months After the Three Mile Island Accident*, 14 URBAN AND SOCIAL CHANGE REVIEW 12 (1981).

[22] Chisholm & Kasl, *The Effects of Work Site, Supervisory Status, and Job Function on Nuclear Workers' Responses to the TMI Accident*, J. OF OCCUPATIONAL BEHAVIOR (in press); Chisholm *et al.*, *Behavioral and Mental Health Effects of the TMI Accident on Nuclear Workers: A Preliminary Report*, 365 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 134 (1981); Kasl, Chisholm &

patients[23]—as well as to the other residents within a five mile radius of the reactor.[24] These studies show acute short term stress reactions to the TMI accident which were qualitatively the same as fear reactions from other kinds of disasters[25] and quantitatively significant both

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Eskenazi, *The Impact of the Accident at the Three Mile Island on the Behavior and Well-being of Nuclear Workers: Part I. Perceptions and Evaluations, Behavioral Responses, and Work-Related Attitudes and Feelings*, 71 AM. J. OF PUBLIC HEALTH 472 (1981); Kasl, Chisholm & Eskenazi, *The Impact of the Accident at the Three Mile Island on the Behavior and Well-being of Nuclear Workers: Part II. Job Tension, Psychophysiological Symptoms, and Indices of Distress*, 71 AM. J. OF PUBLIC HEALTH 484 (1981).

[23] Bromet, Schulberg & Dunn, *Reactions of Psychiatric Patients to the Three Mile Island Nuclear Accident*, ARCHIVES OF GENERAL PSYCHIATRY (in press); E. Bromet *et al.*, THREE MILE ISLAND: MENTAL HEALTH FINDINGS (NIMH Contract #278-79-0048(SM) 1980).

[24] A. Baum *et al.*, CHRONIC AND ACUTE STRESS ASSOCIATED WITH THREE MILE ISLAND ACCIDENT AND DECONTAMINATION, PRELIMINARY FINDINGS OF A LONGITUDINAL STUDY (Draft report to USNRC 1981); A. Baum *et al.*, PSYCHOLOGICAL STRESS FOR ALTERNATIVES OF DECONTAMINATION OF THREE MILE ISLAND-2 REACTOR BUILDING ATMOSPHERE (USNRC Report 1980); C. Flynn, THREE MILE ISLAND TELEPHONE SURVEY, PRELIMINARY REPORT ON PROCEDURES AND FINDINGS (USNRC 1979); P. Houts *et al.*, HEALTH-RELATED BEHAVIORAL IMPACT OF THE THREE MILE ISLAND NUCLEAR INCIDENT PARTS I AND II (Report to TMI Advisory Panel, Pa. Dept. of Health 1980); P. Houts *et al.*, HEALTH-RELATED BEHAVIORAL IMPACT OF THE THREE MILE ISLAND NUCLEAR INCIDENT PART III, Report to TMI Advisory Panel, Pa. Dept. of Health (1981); Houts, DiSabella & Goldhaber, *Extent and Duration of Psychological Distress of Persons in the Vicinity of Three Mile Island*, 54 PROCEEDINGS OF THE PENNSYLVANIA ACADEMY OF SCIENCE 22 (1980); Warheit, Dohrenwend *et al.*, *Stress in the Community: A Report to the President's Commission of the Accident at Three Mile Island*, 365 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 159 (1981).

[25] Proceedings, *supra* xii-xiv; R. Holt, A SELECTIVE REVIEW OF RESEARCH ON HEALTH EFFECTS OF THE ACCIDENT AT THREE MILE ISLAND (NIMH Contract #5-K06-MH-12455 1982).

in terms of severity for individuals and incidence among area residents. Several studies have also shown long term low level chronic stress reactions in a significant portion of area residents.[26]

These studies have been received by the Commission staff. In addition, the Commission convened a meeting of prominent psychosocial researchers to consider the extent to which these and other studies could be used to predict the kind and amount of psychological stress which restart of the TMI-1 reactor might cause.[27] The group also considered ways in which adverse psychological reactions could be mitigated through community education, provision of mental health services and other measures.[28]

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[26] A. Baum *et al.*, CHRONIC AND ACUTE STRESS ASSOCIATED WITH THREE MILE ISLAND ACCIDENT AND DECONTAMINATION, PRELIMINARY FINDINGS OF A LONGITUDINAL STUDY (Draft report to USNRC 1981); A. Baum *et al.*, PSYCHOLOGICAL STRESS FOR ALTERNATIVES OF DECONTAMINATION OF THREE MILE ISLAND-2 REACTOR BUILDING ATMOSPHERE (USNRC Report 1980); Bromet & Dunn, *Mental Health of Mothers Nine Months After the Three Mile Island Accident*, 14 URBAN AND SOCIAL CHANGE REVIEW 12 (1981); E. Bromet *et al.*, THREE MILE ISLAND: MENTAL HEALTH FINDINGS (NIMH Contract #278-79-0048(SM) 1980); Houts, DiSabella & Goldhaber, *Extent and Duration of Psychological Distress of Persons in the Vicinity of Three Mile Island*, 54 PROCEEDINGS OF THE PA. ACADEMY OF SCIENCE 22 (1980); Kasl, Chisholm & Eskenazi, *The Impact of the Accident at the Three Mile Island on the Behavior and Well-being of Nuclear Workers: Part I. Perceptions and Evaluations, Behavioral Responses, and Work-Related Attitudes and Feelings*, 71 AM. J. OF PUBLIC HEALTH 472 (1981); Kasl, Chisholm & Eskenazi, *The Impact of the Accident at the Three Mile Island on the Behavior and Well-being of Nuclear Workers: Part II. Job Tension, Psychophysiological Symptoms, and Indices of Distress*, 71 AM. J. OF PUBLIC HEALTH 484 (1981).

[27] Proceedings 47-67.

[28] Proceedings 68-73. A systematic program of psychological intervention can reduce the impact of accidents on individuals, families and communities. State mental health agencies frequently are

There was agreement that additional studies should be undertaken and additional analysis of existing studies done to predict more accurately the long term chronic effects of anticipatory anxiety and exacerbated stress reactions at TMI.[29]

In these circumstances, consideration of the legal issue raised by the Commission would be premature. If the Commission ultimately determines that the physical effect of the federal action will in fact cause psychological stress of the type identified by the Court of Appeals, the legal issue upon which the Commission now seeks review will disappear. Moreover, the conflict in the circuits which the Commission claims was created by the Court of Appeals' decision will also evaporate. If, on the other hand, the Commission ultimately decides that the physical effects of the TMI-1 restart will *not* cause psychological effects of the type identified by the Court of Appeals, the issue upon which the Commission now seeks review will be sharply presented to the Court on the basis of a developed factual record. And the conflict in the circuits, if indeed one exists, would be clearly presented to the Court for resolution.

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involved in such planning for specific emergencies. The capacity of state and local resource systems should be taken into account when major federal actions are taken which have the potential of producing psychological injuries. K. Tienery & B. Baisden, CRISIS INTERVENTION PROGRAMS FOR DISASTER VICTIMS: A SOURCE BOOK AND MANUAL FOR SMALLER COMMUNITIES (DHEW Pub. #ADM 79-675 1975); R. Cohen & F. Ahearn, Jr., HANDBOOK FOR MENTAL HEALTH CARE OF DISASTER VICTIMS (1980).

[29] Proceedings 63-68.

## CONCLUSION

The petitions should be denied.

Respectfully submitted,

MARGARET F. EWING
(Counsel of Record)
GEOFFREY P. MILLER
BRUCE J. ENNIS
ENNIS, FRIEDMAN, BERSOFF
& EWING
Suite 511
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 775-8100
*Attorneys for* Amicus Curiae
*American Psychological Association*

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No. 82-358

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

*v.*

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## REPLY MEMORANDUM FOR THE PETITIONERS

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REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

LEONARD BICKWIT, JR.
*General Counsel*
*Nuclear Regulatory Commission*
*Washington, D.C. 20555*

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## REPLY MEMORANDUM FOR THE PETITIONERS

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In our petition we explain that the decision of the court of appeals tendered for review discards a fundamental limitation upon the scope of the environmental analysis mandated by the National Environmental Policy Act. That limitation, firmly anchored in the plain language of the statute (see 42 U.S.C. 4332(2)(C)(i)), is simply that analysis is required only of those effects of contemplated federal action that are traceable to the impact of the action upon the natural or physical environment. It is only such effects that may plausibly be considered "*environmental* impact[s] of [a] proposed action" (*ibid.*; emphasis added). Rather than confront the thrust of our argument, respondent People Against Nuclear Energy

(PANE) attempts to turn it aside. Several points raised by respondent warrant response.[1]

1. Respondent's primary contention (Br. in Opp. 41-46) is that the decision of the court of appeals is consistent with the limitation, emphasized in our petition, upon the scope of the environmental statement that NEPA requires. Respondent suggests that our petition presents no more than a factual dispute as to whether the alleged mental health effects are traceable to the physical environmental impact of restarting the TMI-1 reactor (Br. in Opp. 45-46). Respondent's suggestion is disingenuous. The issue in this case has at all times been regarded as a purely legal one; respondent has never before suggested otherwise.[2] Like the Commission and all of the parties, the court of appeals treated the issue as a purely legal one as well (see 81-2399 Pet. App. 11a-17a). That court plainly did not view the question whether or not NEPA requires the analysis which its judgment uncon-

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[1] Contrary to respondent's suggestion (Br. in Opp. 3-4), our petition does not "seek a ruling" that the mental health effects of restart at TMI-1 "should not be considered by the Nuclear Regulatory Commission." The issue, of course, is not whether consideration of such effects is prudent or wise policy, but whether, absent an environmental basis for such effects, NEPA requires that they be formally analyzed. It is not our petition, but the court of appeals decision, that improperly blurs the line between law and policy. See 81-2399 Pet. App. 17a ("We cannot believe that the psychological aftermath of the March 1979 accident falls outside the broad scope of [NEPA]."). We note that the court of appeals rejected respondent's contention that the Atomic Energy Act requires consideration of the mental health effects of the restart decision; respondent has evidently chosen not to seek further review of that decision.

[2] The Commission framed the issue as whether accident-related psychological distress that was "*unrelated* directly to exposure to radiation" was "legally * * * relevant to th[e] [restart] proceeding." *In re Metropolitan Edison Co.*, 10 N.R.C. 141, 148 (1979) (emphasis added). Both the Licensing Board and the Commission framed the issue in legal terms (see Pet. 4-9) and respondent never argued at any point in those proceedings or in the court of appeals that disposition of the issue required resolution of factual matters.

ditionally requires as turning upon an unresolved question of fact that was not mentioned, much less directed to be considered by the Commission on remand (see 81-2399 Pet. App. 29a-30a).

In any event, there is no issue of fact to be considered. Respondent is unable, even now, to suggest how the mental health effects outlined in its draft contentions can be traced to the environmental effects of the proposed federal action. Indeed, respondent's efforts (Br. in Opp. 32-33, 42-45) to demonstrate the necessary causal nexus simply underscore the absence of the required connection. Thus, respondent argues that NEPA mandates assessment of the mental health effects of restart because:

1) the TMI-2 accident caused releases of radiation—an environmental effect;

2) the TMI-2 accident threatened to cause other, more serious, environmental effects;

3) apprehension caused by the TMI-2 accident engendered mental health effects;

4) restart of TMI-1 creates potential for future radiation releases or even a serious nuclear accident; and

5) restart of TMI-1 may exacerbate the stresses caused by the TMI-2 accident.

The foregoing premises, however, are insufficient to establish that any stress that may be occasioned by the restart decision is in any way traceable to the environmental effects, potential or certain, that would be attributable to restart. Respondent simply demonstrates that potential environmental effects and mental health effects flow from a common source. But as we explain in our petition (Pet. 17), NEPA requires assessment only of the environmental impacts of major, environmentally significant, federal actions—not assessment of all of the effects of such actions.

Because the Commission recognizes that it must consider what respondent characterizes as the "holocaust potential" of a major nuclear accident—i.e., that it must

assess the environmental effects of such an accident—respondent reasons that (Br. in Opp. 45):

> That holocaust potential * * * is precisely the sort of impact on the natural or physical environment that the Commission argues must be the proximate cause of any psychological health damage to be considered under NEPA.

Petitioner thus identifies "holocaust potential" as the environmental cause of the mental health problems they tender for analysis under NEPA. *Quod erat demonstrandum.* But this is no more than a play upon words. As we explain in our petition (Pet. 23-24), NEPA may require the consideration of events—such as a major nuclear accident—that are quite unlikely to occur but that would entail substantial environmental effects if they occurred.[3] Such a major accident may perhaps be labeled a "potential holocaust." But it does not follow that the mental health effects of the possibility (which respondent labels "holocaust potential") of a major nuclear accident entailing environmental effects are themselves environmentally caused.[4] On the contrary, respondent's analysis,

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[3] Thus, respondent errs in characterizing (Br. in Opp. 43 n.37) our argument as holding that "psychological health damage related to the restart of Unit 1 cannot be considered because there is no realistic probability of an accident." The question whether a major nuclear accident is so unlikely as to place the environmental effects of such an accident entirely outside the scope of NEPA analysis is not presented here. Neither does our argument depend in any way upon characterization of respondent's members' fears as irrational.

[4] That respondent's argument rests on semantic legerdemain is clear from its pervasive relevance upon such verbal formulations to avoid our argument. See, *e.g.*, Br. in Opp. 12 (The alleged "psychological health damage * * * is directly related to the *potential* of a nuclear reactor to cause overwhelming damage to the human environment."), 38 (The alleged mental health effects "involve[] a *concern related to the prospect* of further devastating impact on the physical environment."), 53 ("Restart of [TMI-1] would sig-

like the court of appeals' decision, plainly requires consideration of the nonenvironmental effects of federal action.[5]

2. Respondent also claims (Br. in Opp. 47-54) that an impact upon the natural or physical environment is not needed to trigger the assessment obligations imposed by NEPA, seeking support in the legislative history of NEPA and Council on Environmental Quality (CEQ) regulations for that view. The search is unavailing, for respondent's argument is directed at a straw man.

It is not our submission that effects upon human beings are for that reason excluded from the scope of analysis under NEPA. Rather, the point of our argument is simply that NEPA covers only those effects of federal action upon man that are propagated through environmental variables. Thus, contrary to respondent's assertion (Br. in Opp. 47-49), our argument in no respect

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nificantly affect the human environment * * * by significantly altering the *psychological context* for local residents") (emphasis added). Most revealing is respondent's ingenuous explanation (Br. in Opp. 53-54 n.45) that:

> The fact that this health damage derives from an alteration of the human environment is most clearly illustrated by the fact that if people were to move away—to a different human environment—they would not suffer the same damage to their health upon the restart of TMI-1.

Similar statements—all literally correct—could be made about any federal action that affects people in any manner.

[5] The additional factual issues canvassed by respondent (Br. in Opp. 57-60) simply are not relevant to the question presented by our petition. Respondent does not suggest that proceedings upon remand will address the issues canvassed and thereby make unnecessary a decision upon the question now presented. In fact the judgment of the court of appeals does not direct the Commission to address any of the issues noted by respondent. Moreover, contrary to the respondent's suggestion (Br. in Opp. 61), the Commission is not now engaged in developing a factual record respecting these issues; similarly inaccurate is the American Psychological Association's statement (Br 7) that the Commission has "reopened its docket" to receive evidence respecting psychological stress.

detracts from the central focus of NEPA upon the "human environment" (42 U.S.C. 4332(2)(C)). A major federal action significantly affecting the quality of man's environment is assuredly the statutory trigger for preparation of an environmental impact statement. *Ibid.* But it is equally clear that the statement required need only address the "environmental impact of the proposed action" (42 U.S.C. 4332(2)(C)(i))—and thus that it need not address *non-environmental* effects of federal action whether upon human beings or otherwise. In short, our submission would not, as charged, read out of the statute the intended focus upon the *human* environment; it is respondent and the court of appeals that have rewritten the statute by eliminating the requirement that the effects of federal action to be addressed be *environmental.*

Respondent's reliance (Br. in Opp. 50-52) upon CEQ regulations is equally unavailing. As is explained in our petition (Pet. 19-20 n.14), the CEQ regulations do not purport to define the term "environmental" for the purposes of 42 U.S.C. 4332(2)(C)(i) (requiring a "detailed statement" on "the environmental impact of the proposed action"). The broad definition of the terms "impacts" and "effects" contained in the regulations (40 C.F.R. 1508.8)[6] upon which respondent relies does not dispense with the separate *statutory* directive that the impacts to be surveyed under NEPA be *environmental*—i.e., environmentally grounded or caused; nor could they be effective to achieve that result. That the CEQ regulations do not sanction expansion of the duties imposed by NEPA in the manner suggested by respondent is underscored by other provisions of the regulations. See 40 C.F.R. 1502.10(e), 1502.16 and 1508.14.[7]

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[6] The regulations treat these terms as synonymous. 40 C.F.R. 1508.8(b). The pertinent definition provides that "[e]ffects includes ecological * * * aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." *Ibid.*

[7] The regulations repeatedly describe the portion of an environmental impact statement that fulfills the requirements of 42 U.S.C. 4332(2)(C)(i) as a statement of the "[e]nvironmental [c]onse-

3. Respondent's effort (Br. in Opp. 33-38) to distinguish this case from the numerous decisions of other courts of appeal with which it conflicts (see Pet. 25-26) likewise fails. There is no need to respond here to the factual distinctions propounded by respondent. Those distinctions are simply unresponsive to our argument and can not serve to reconcile the decision of the court of appeals below with the numerous decisions of the courts of appeals recognizing that identification of an environmental cause is the "trigger" for any duty under NEPA to analyze an effect of federal action.[8] There can be little doubt that that application of the law as announced in the decisions we cite would result in a judgment for petitioners. Accordingly, the existing conflict of authorities requires this Court's attention.[9]

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quences" of the proposed action (40 C.F.R. 1502.10(e) and 1502.16). Moreover, the regulations specify that the statutory term "[h]uman [e]nvironment" embraces "the natural and physical environment and the relationship of people with that environment" (40 C.F.R. 1508.14). The Council's explanatory comment (43 Fed. Reg. 55988 (1978)), stressed by respondent, indicating that it was not CEQ's intention to limit the foregoing definition of the human environment "to the natural and physical aspects of the environment" merely reaffirms that the concern for the environmental effects of federal action extends to people as well as plants, animals and inanimate objects The Council plainly did not intend by this language to suggest that all aspects of every major federal action significantly affecting mankind be the subject of an "environmental" impact statement.

[8] Respondent suggests (Br. in Opp. 38) that the decision in *Como-Falcon Community Coalition, Inc.* v. *Department of Labor*, 609 F.2d 342 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980), rests upon a factual finding that the socioeconomic effects in question there were insignificant. On the contrary, although the district court in that case had made such a finding (see 609 F.2d at 345), the court of appeals expressly held that the "district court erred" in considering these issues, and that they were as a matter of law outside NEPA. *Id.* at 345-346.

[9] Respondent's assurances (Br. in Opp. 32, 62) that the decision in this case is "unique" and would not control any other circum-

4. In closing, we pause to note respondent's contention (Br. in Opp. 28-31) that the petitions in this case present purely "hypothetical concerns" unworthy of this Court's attention. This claim rests upon respondent's contention that the NRC could comply with the court of appeals order without delaying restart of TMI-1. That contention is not necessarily correct; in any event it provides no basis for denying certiorari.

a. Contrary to respondent's intimation, the delay to date in proceeding with the evaluation necessitated by the court's decision results principally from the complexity of the task imposed by the court.[10] As PANE observes (Br. in Opp. 29), only four weeks after the court's initial judgment was rendered—more than three months before the court issued its opinions—the Commission's staff convened a panel of prominent social scientists to discuss how the Commission could obtain the information needed to comply with the court's decision. The consensus of the participants was that collecting the necessary data on the probable psychological effects of resumed operation would require the formulation and administration of new survey instruments. One of the participants was given the task of developing the necessary survey. The NRC staff transmitted the resulting draft survey instrument to the

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stances provides little comfort. As the private petitioners have noted (81-2399 Reply Brief 5 & n.7) the court of appeals' decision has prompted significant litigation designed to press the D.C. Circuit's rationale to its logical conclusion. We note as well the decision in *City of New York* v. *United States Department of Transportation*, 539 F. Supp. 1237, 1273-1274 (S.D.N.Y. 1982), appeal pending, Nos. 82-6094, 82-6200 (2d Cir.), holding that the consequences of fear produced by shipment of radioactive materials must be addressed under NEPA in connection with the promulgation of federal regulations governing that subject.

[10] That task was complicated by the fact that after three months of effort directed at compliance with the court of appeals' January 7 interim judgment, the Commission found those directives substantially altered by the issuance of the court's Amended Judgment on April 2, 1982.

National Institute of Mental Health requesting comments upon the scientific validity of the proposed study. It was subsequently determined that the survey instrument needed substantial refinement, and the survey was withdrawn for revisions that are still underway.

Contrary to respondent's suggestion, even if the Commission were now to proceed with maximum dispatch to complete the determination required by the court of appeals it is highly unlikely that the Commission could do so before the time that technical difficulties that now preclude restart are resolved.[11] Even if the Commission's evaluation of psychological effects of restarting TMI-1 could be completed before the time at which the plant is otherwise ready to be restarted, there is no guarantee that its evaluation would satisfy the court of appeals.[12] Thus there is a substantial likelihood that compliance with the court of appeals' decision, no matter how energetically pursued by the Commission, would result in a delay in restarting the reactor (assuming that all other legal barriers to restart have been resolved by appropriate commission action by that time).

b. More fundamentally, it is entirely irrelevant that the Commission might be able to comply with the court of appeals' decision. The existence of practical difficulties that delay restart here is purely fortuitous. It would be a novel and unfair rule of law that would require a party to forego the opportunity for appellate review of a decision, believed to be erroneous, that imposes legal obliga-

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[11] According to current projections, restart may become technically feasible by March 1, 1983.

[12] PANE has asserted that the Commission may not allow restart of TMI-1 without reopening the restart hearing to consider a full supplement environmental impact statement on the psychological impacts of restart. Response to Licensee's Motion with Respect to Psychological Health Issue (filed June 3, 1982), *In re Metropolitan Edison Co.*, No. 50-289. It accordingly ill behooves respondent to make light of the procedural burden imposed by the court of appeals upon the Commission.

tions, simply because compliance is physically possible. Respondent has not suggested that compliance would be cost-free or inexpensive and no such suggestion would be credible here.

For the foregoing reasons as well as those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
*Solicitor General*

LEONARD BICKWIT, JR.
*General Counsel*
*Nuclear Regulatory Commission*

OCTOBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 383889 1147

(SHOW )  PROCEEDINGS AND ORDERS  DATE: 030283

CASE NBR 82-1-00358 CFX
SHORT TITLE NRC, et al.  DOCKETED: Aug 30 1982
VERSUS People Against Nuclear

| Date | Proceedings and Orders |
|---|---|
| Jun 18 1982 | Application for extension of time to file petition and order granting same until August 20, 1982 (Chief Justice, June 23, 1982). |
| Aug 10 1982 | Application for further extension of time to file petition and order granting same until August 30, 1982 (Chief Justice, August 12, 1982). |
| Aug 30 1982 | Petition for writ of certiorari filed. |
| Sep 27 1982 | Motion of Atomic Industrial Forum for leave to file a brief as amicus curiae filed. |
| Sep 30 1982 | Motion of American Mining Congress for leave to file a brief as amicus curiae filed. |
| Sep 30 1982 | Brief of respondents People Against Nuclear Energy, et al. in opposition filed. VIDED. |
| Sep 30 1982 | Motion of The Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed. |

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(SHOW )  PROCEEDINGS AND ORDERS  DATE: 030283

CASE NBR 82-1-00358 CFX
SHORT TITLE NRC, et al.  DOCKETED: Aug 30 1982
VERSUS People Against Nuclear

| Date | Proceedings and Orders |
|---|---|
| Sep 30 1982 | Brief amicus curiae of Natl. Assn. of Manufacturers filed. |
| Sep 30 1982 | Brief amicus curiae of Edison Electric Institute filed. |
| Oct 1 1982 | Brief amicus curiae of Natl. Rural Electric Coop. filed. |
| Oct 1 1982 | Brief amicus curiae of Scientists & Engineers, etc. filed. |
| Sep 30 1982 | Brief amicus curiae of American Psycological Assn. filed. |
| Oct 6 1982 | DISTRIBUTED. October 29, 1982 |
| Oct 7 1982 | Reply brief of respondents Metro. Edison Co., et al. filed. VIDED. |
| Oct 22 1982 | Reply brief of petitioners filed. |
| Nov 1 1982 | Motion of Atomic Industrial Forum for leave to file a brief as amicus curiae GRANTED. |
| Nov 1 1982 | Motion of American Mining Congress for leave to file a brief as amicus curiae GRANTED. |
| Nov 1 1982 | Motion of The Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED. |

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{SHOW } PROCEEDINGS AND ORDERS DATE: 030283

CASE NBR 82-1-00358 CFX
SHORT TITLE NRC, et al. DOCKETED: Aug 30 1982
VERSUS People Against Nuclear

| Date | Proceedings and Orders |
|---|---|
| Nov 1 1982 | Petition GRANTED. The case is consolidated with 81-2399 and a total of one hour is allotted for oral argument. ********** |
| Dec 1 1982 | Joint appendix filed. VIDED. |
| Dec 16 1982 | Brief amicus curiae of Natl. Assn. of Manufacturers filed. VIDED. |
| Dec 16 1982 | Brief amicus curiae of Atomic Industrial Forum filed. VIDED. |
| Dec 16 1982 | Order extending time to file brief of petitioner on the merits until December 23, 1982. |
| Dec 16 1982 | Brief of respondent Metro. Edison Co., et al. filed. |
| Dec 16 1982 | Brief amicus curiae of Edison Electric Institute filed. VIDED. |
| Dec 16 1982 | Brief amicus curiae of Scientists & Engineers, etc. filed. VIDED. |
| Dec 23 1982 | Brief of petitioners United States, et al. filed. VIDED. |

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{SHOW } PROCEEDINGS AND ORDERS DATE: 030283

CASE NBR 82-1-00358 CFX
SHORT TITLE NRC, et al. DOCKETED: Aug 30 1982
VERSUS People Against Nuclear

| Date | Proceedings and Orders |
|---|---|
| Jan 11 1983 | Order extending time to file brief of respondent on the merits until January 29, 1983. |
| Jan 17 1983 | Record filed. |
| Jan 17 1983 | Certified original record (Box) received. |
| Jan 7 1983 | SET FOR ARGUMENT. Tuesday, March 1, 1983. (1st case) The case is consolidated with case No. 81-2399. (1 Hour) |
| Jan 21 1983 | CIRCULATED. |
| Jan 29 1983 | Brief of respondent People Against Nuclear Energy filed. VIDED. |
| Jan 28 1983 | Brief amicus curiae of American Socialogical Assn. filed. VIDED. |
| Jan 29 1983 | Brief amicus curiae of American Psycological Assn. filed. VIDED. |
| Jan 29 1983 | Brief amicus curiae of Union of Concerned Scientists filed. VIDED. |

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PROCEEDINGS AND ORDERS DATE: 030283

CASE NBR 82-1-00358 CFX
SHORT TITLE NRC, et al. DOCKETED: Aug 30 1982
VERSUS People Against Nuclear

| Date | Proceedings and Orders |
|---|---|
| Feb 22 1983 | Reply brief of respondents Metro. Edison Co., et al. filed. |
| Feb 22 1983 | Reply brief of petitioners United States, et al. filed. VIDED. |
| Mar 1 1983 | ARGUED. |